34063

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 504.

JOHN D. WALL AND THOMAS W. HUSKE, TRADING AS WALL & HUSKE, APPELLANTS,

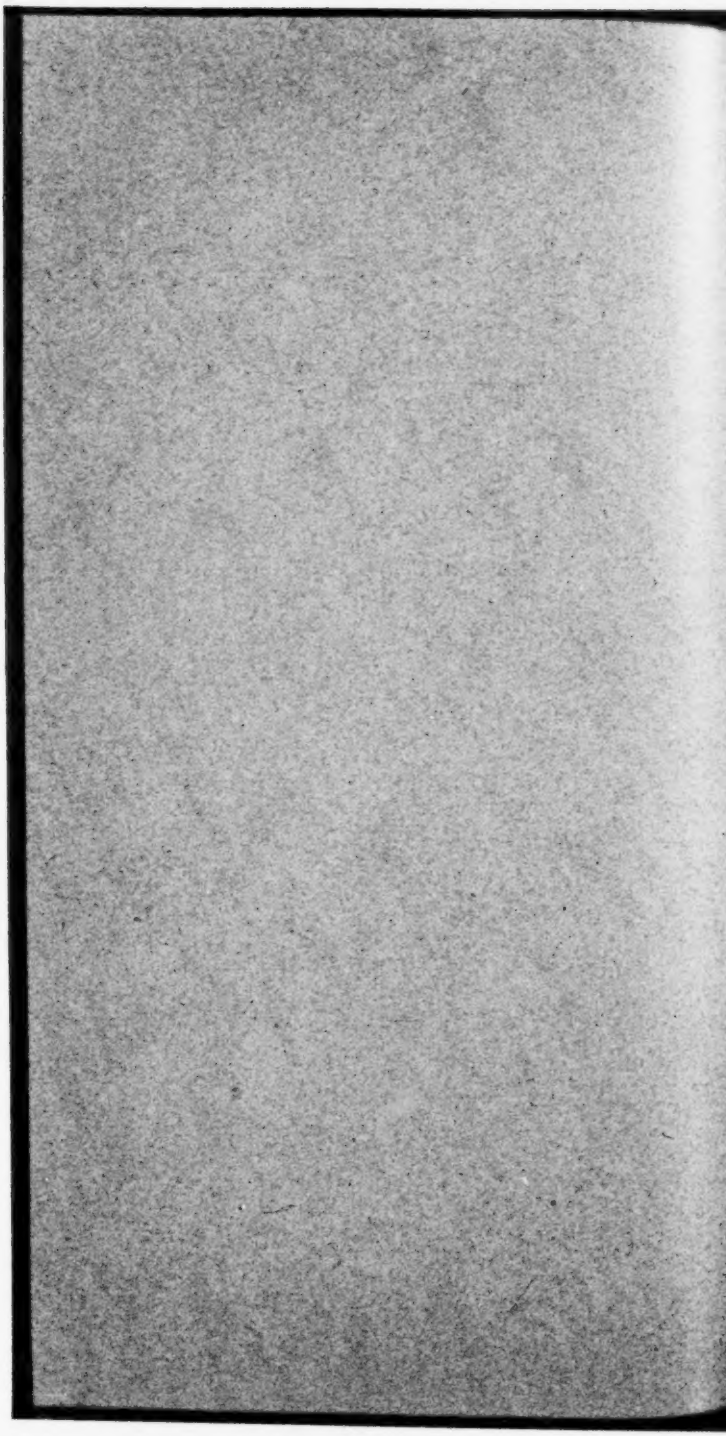
vs.

WALTER O. COX, TRUSTEE OF W. H. GILBERT, TRADING AS WINSTON HARDWARE COMPANY AND AS GILBERT HARDWARE COMPANY

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED DECEMBER 10, 1900.

(17,989.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1900.

JOHN D. WALL and THOMAS W. HUSKE, Partners, Trading as Wall & Huske, Petitioners,
versus
W. O. COX, Trustee of W. H. Gilbert, Trading as Winston Hardware Co. and as Gilbert Hardware Company, Respondents.

On certificate from the United States circuit court of appeals for the fourth circuit, at Richmond.

Glenn & Manly, Winston, N. C., for petitioners.
Jones & Patterson and L. M. Swink, of Winston, N. C., for respondents.

1 United States Circuit Court of Appeals, Fourth Circuit.

J. D. WALL and T. W. HUSKE, Partners, Trading as Wall & Huske, Appellant-,
vs.
W. O. COX, Trustee of the Estate of W. H. Gilbert, Trading as Winston Hardware Company and as Gilbert Hardware Company, a Bankrupt, Appellee. } No. 355.

An appeal from the district court of the United States for the western district of North Carolina, sitting at Greensboro, N. C.

This is to certify that certain creditors of W. H. Gilbert, on the 12th day of October, 1899, filed a petition in bankruptcy in the district court of the United States for the western district of North Carolina against said W. H. Gilbert, trading as the Winston Hardware Company and Gilbert Hardware Company, alleging as grounds on which said W. H. Gilbert should be declared a bankrupt the following:

"That said W. H. Gilbert is insolvent, and that within four months next preceding the date of this petition the said W. H. Gilbert committed an act of bankruptcy, to wit, on the tenth day of October, 1899, in that he conveyed, transferred, concealed, or removed or permitted to be concealed or removed a large portion or all his property with intent to hinder, delay, and defraud his creditors by certain bills of sale which he made to J. D. Wall and T. W.
2 Huske, of Winston, N. C., and also in that he transferred while insolvent a portion of his property to one or more of his creditors with intent to prefer such creditors over others of his creditors.

That on the 14th day of October, 1899, on the petition of the aforesaid creditors of W. H. Gilbert, a notice to show *cause* and restraining order *was* issued by his honor H. G. Ewart, judge.

United States District Court, Western District *Court* of North Carolina.

In the Matter of W. H. GILBERT, Trading as the Winston Hardware Company and as the Gilbert Hardware Company, In Bankruptcy.

To J. D. Wall and T. W. Huske, trading as Wall & Huske, of Winston, N. C.:

Pursuant to an order made by Hon. Hamilton G. Ewart, judge of the district court of the United States for the western district of North Carolina, on the 14th day of October, A. D. 1899, at Hendersonville, N. C., you are hereby notified and commanded to appear before said court, at Gatesville, N. C., on the 24th day of October, A. D. 1899, and show cause, if any there be, why you shall not be perpetually enjoined from selling, transferring, or disposing of the stock of goods and other property alleged to have been purchased by you from the said W. H. Gilbert, bankrupt; and in the meantime you are hereby restrained and enjoined from disposing of the said stock of goods or any part thereof, or any proceeds there-
3 from, or any books, accounts, invoices, or other evidence of the amount and value of the same.

Witness the Honorable Hamilton G. Ewart, judge of the said court, and the seal thereof, at Greensboro, in said district, on the 14th day of October, A. D. 1899.

[SEAL.] SAM'L L. TROGDEN, *Clerk.*

At the time of the issuing of said order Wall & Huske, appellants, had in their possession a stock of goods purchased by them from W. H. Gilbert on the 10th day of Oct., 1899. On the 27th day of October, 1899, Judge Ewart made an order adjudging said W. H. Gilbert a bankrupt, and on the 6th day of November, 1899, made the following order:

"United States District Court, Western District of North Carolina.

In re W. H. GILBERT, Trading as the Winston Hardware Company and as the Gilbert Hardware Company, and WALL & HUSKE.

In the above-entitled cause it is ordered that the restraining order heretofore issued be continued until the appointment and qualification of trustee of W. H. Gilbert, bankrupt. Upon the appointment and qualification of said trustee in a proper case and upon the proper showing an injunction or restraining order may be obtained upon application, in which Wall & Huske, defendants above named, may be made parties, restraining the sale or other disposition of any of the property until a hearing may be had and
4 the matters at issue be determined, either by a suit in equity or action at law in the United States courts or the courts of the State, as petitioners may be advised."

At Hendersonville, N. C., this the 6th day of November 1899.

H. G. EWART,
U. S. Judge.

That on the 23rd day of November, 1899, W. O. Cox was, by the creditors of W. H. Gilbert, duly elected as trustee of said W. H. Gilbert, bankrupt, and qualified as such, and on the 6th day of December, 1899, said W. O. Cox, trustee, sued out a writ of subpœna in the district court of the United States for the western district of North Carolina, sitting as a court of bankruptcy, which subpœna was duly served on the defendants Wall & Huske, and in a cause entitled W. O. Cox, trustee of the estate of W. H. Gilbert, trading as the Winston Hardware Company and as the Gilbert Hardware Company, a bankrupt, complainant, against J. D. Wall and T. W. Huske, partnesr, trading as Wall & Huske, respondents, the said W. O. Cox, trustee, as aforesaid, did, on the 6th day of December, 1899, duly file his bill of complaint as follows:

5 *Caption.*

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the District Court. In Bankruptcy.

At a district court of the United States for the western district of North Carolina, at chambers, in Winston, on the 6th day of January, in the year of our Lord one thousand and nine hundred, within said district, before the Honorable Hamilton G. Ewart, United States district judge, holding said court, the following proceedings were had:

Bill of Complaint.

In the District Court of the United States for the Western District of North Carolina. In Bankruptcy.

WALTER O. COX, Trustee of the Estate of W. H. Gilbert, Trading as Winston Hardware Co. and as Gilbert Hardware Co., a Bankrupt, Complainant,
vs.
J. D. WALL and T. W. HUSKE, Partners, Trading as Wall & Huske, Respondents. } In Equity. No. —.

To the honorable the judges of the district court of the United States for the western district of North Carolina, as a court of bankruptcy:

Walter O. Cox, trustee of the estate of W. H. Gilbert, trading as Winston Hardware Co. and as Gilbert Hardware Co., a bankrupt, of Winston, and a citizen of the State of North Carolina, brings this his bill against J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, of Winston, citizens of the State of North Carolina, and inhabitants of the western district of North Carolina.

And thereupon your orator complains and says that W. H.
6 Gilbert, trading as Winston Hardware Co. and as Gilbert Hardware Co., late a resident of Winston, North Carolina, in the said western district of North Carolina, was there-fore, to wit, on

the 27th day of October, A. D. 1899, duly adjudicated a bankrupt by this honorable court, sitting as a court of bankruptcy, within the intent and meaning of the acts of Congress relating to bankruptcy.

Your orator further shows to your honor that thereafter, on the 23rd day of Nov., A. D. 1899, your orator was duly appointed trustee of the estate of said bankrupt and qualified as such trustee on the 2nd day of December, A. D. 1899, by giving bond, as required by the order of this honorable court and the acts of Congress relating to bankruptcy, and entered upon the performance of his duties as such trustee.

Your orator further shows to your honor that on the 9th day of October, A. D. 1899, and for about twelve months theretofore, W. H. Gilbert, bankrupt as aforesaid, was conducting a retail hardware store on Trade street, Winston, N. C., and was the owner of and in possession of a large and valuable stock of hardware, store fixtures, and bills receivable, situated therein and owing thereto. The actual value of said stock of hardware, store fixtures, and accounts due amounted to between $17,000 and $18,000.

Your orator further shows to your honor that at the date aforesaid, to wit, on the 9th day of October, A. D. 1899, the said W. H. Gilbert was insolvent, owing large amounts of money, contracted in the purchase of the stock of hardware heretofore mentioned. A large amount of said indebtedness had heretofore been extended as to the time of payment upon the false and fraudulent representation of the said W. H. Gilbert, a large portion of said indebtedness being
7 past due and a large portion becoming due within a few weeks, this indebtedness being evidenced to a large extent by notes, a portion falling due in Octo., 1899, another portion falling due in Nov. and Dec., 1899, and Jan'y 1st, 1900.

Your orator further shows to your honor that thereafter, to wit, on the night of Octo. 10th, 1899, and subsequent to the passage of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and within four months prior to the filing of the petition of certain creditors to have the said W. H. Gilbert adjudicated a bankrupt, the said W. H. Gilbert, with intent on his part to hinder, delay, or defraud his creditors, conveyed, transferred, and assigned all of his property, consisting of this stock of hardware, store fixtures, and accounts situated in his said storehouse, on Trade street, Winston, N. C., by means of a certain paper-writing purporting to be a deed or bill of sale to the respondents, J. D. Wall and T. W. Huske, trading as Wall & Huske.

Your orator further shows to your honors that within a few minutes after the execution of the said paper-writing, purporting to be a deed or bill of sale, and the transfer, conveyance, and assignment was made by the said W. H. Gilbert, the said Gilbert, having demanded and received currency in payment of said stock of goods and having received whatever payments were made or pretended to be made to him, pocketed the money so received and left for parts unknown without applying any money so received or to be received to the payment of his indebtedness, and immediately thereafter the

respondents went into the possession of the entire property, as aforesaid, belonging to the bankrupt in the city of Winston, N. C.

Your orator further shows to your honors that the petition
8 in bankruptcy alleging these facts was filed in this honorable court against the said W. H. Gilbert on the 12th day of Octo., A. D. 1899, and the conveyance, transfer, and assignment of this property and the execution of the aforesaid paper-writing purporting to be a deed or bill of sale for said property was within four months prior to the filing of said petition and the adjudication made thereon, and that at the date of the said conveyance, transfer, and assignment of the said property and the execution of the paper-writing the said W. H. Gilbert was insolvent, and the said conveyance, transfer, and assignment of said stock of goods, fixtures, and accounts is fraudulent and void and the said paper-writing is inoperative and void, in that same is a fraud upon the bankrupt act or the act entitled an "Act to establish a uniform system of bankruptcy throughout the United States," sec. 67 (*e*).

(4.) Your orators further shows to your honors that the said transfer, conveyance, and assignment to said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, was made and done by said Gilbert and by said Wall & Huske, respondents, as aforesaid, with intent to hinder, delay, and defraud the creditors of *the* Gilbert, and the execution of the paper-writing purporting to be a deed or bill of sale was a part of the scheme to hinder, delay, and defraud the creditors of the said W. H. Gilbert.

Your orator further shows to your honors that he has requested the respondents, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, to deliver up the said property to him as such trustee in order that the same might be divided among the creditors of the said W. H. Gilbert, and surrender up and cancel the paper-writing purporting to be a deed or bill of sale for same, and your orator hoped that the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, respondents, would have complied
9 with the reasonable requests of your orator, as in justice and equity they ought to have done; but now so it is, etc., that the respondents allege and pretend that the said transfer, conveyance, and assignment is valid, and that the paper-writing purporting to be a deed or bill of sale to the said stock of hardware, store fixtures, and accounts is a valid deed or bill of sale to the same, and that by reason of said conveyance, transfer, and assignment and the execution of the paper-writing, as aforesaid, they acquired title to said property therein described, and that they were purchasers in good faith and for a present fair consideration; and whereas—

Your orator charges the contrary to be the truth, in that the respondents knew or had been informed or had reason to know, believe, or could have ascertained by exercising reasonable prudence and diligence, that the said W. H. Gilbert was insolvent, and that this conveyance, transfer, and assignment was void, in that the same was in fraud of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," the same was being made on the part of the said W. H. Gilbert with in-

tent to defraud his creditors, to abscond with the money that should be paid to him, and appropriate same to his own use; and they, the said respondents, participated in said fraudulent conduct and intent to defraud the creditors of the said W. H. Gilbert, and but for their aid the fraud could not have been committed, and as the evidence thereof your orator expressly charges that about 18 months prior to this time the said W. H. Gilbert came to Winston, N. C., a man of no property whatever, and accepted a position as a clerk in the hardware store of Brown, Rogers & Co.; that a few weeks thereafter he began business in a small way with one R. B. Crawford, in Winston, N. C., on Trade street, and that about the 25th day of August, 1898, he
10 bought out R. B. Crawford's one-half interest in the firm for $1,200, and immediately thereafter swelled his stock to immense proportions, and that it was well known amongst the hardware trade and business men of Winston that the said Gilbert was doing a wild and reckless business, selling hardware at and below cost, always for cash; that shortly prior to this time the said Gilbert had been compelled to obtain an extension from his various creditors to the amount of $10,500.00, and that these facts were well known to the respondents and the counsel they consulted during the negotiations pending the purchase and conveyance of this stock from the said Gilbert.

Your orator further expressly charges, as evidence of the knowledge of the fraudulent character of this sale on the part of the said respondents, that this large stock of goods, amounting in value to some $17,000 to $18,000, was not inventoried by respondents or anyone else for them, and whatever examination was made of the stock was made at night-time and done secretly. Your orator further alleges, as evidence of the fraudulent intent on the part of the respondents, that they examined the books of said Gilbert or could have done so, and that the books were offered to them for examination if they did not actually examine them, and your orator expressly charges that the same books would have shown that the stock had not been paid for or no considerable part thereof, and in the same book appeared the names and addresses of the creditors of the said Gilbert, with the amounts due each one of them, and the books would have further shown that he was ordering large and unusual quantities of goods from all over the United States; that these large and unusual quantities of goods were passing the front door of the
11 said Wall & Huske on their way from the depot to Gilbert's place of business; that they could have ascertained from the books that the said Gilbert did not intend to pay for the goods and could not have done so with the amount of — paid to him by respondents.

Your orator further charges, as an evidence of the knowledge of respondents of Gilbert's fraudulent intent, that the said Gilbert had attempted to sell out his entire stock of hardware, store fixtures, and accounts, both in his store in Winston, N. C., and in Martinsville, Va., to the following-named persons, to wit, R. C. Click, A. F. Messick, Norman & Moyr, and others for the sum of $5,000 and less,

stating to those prospective purchasers his intention was not to pay his creditors, but to pocket the money and leave on the next train after receiving same, and your orator expressly charges that these facts were well known to the respondents or the counsel with whom they counselled during the pendency of these negotiations.

Your orator further charges, as an evidence of respondents' knowledge of W. H. Gilbert's fraudulent intent and insolvency, that this conveyance, transfer, and assignment was of all of the bankrupt's tangible property; that the said W. H. Gilbert was engaged in the retail hardware business in the city of Winston; that respondents knew that fact and, furthermore, knew that this sale was out of the usual course of business of the said Gilbert and was *prima facie* fraudulent; that same was a disposition of all of the bankrupt's property subject to execution; that respondents knew that said Gilbert owned no real estate, was doing business in a rented store, and was living in a rented house, and your orator charges that respondents were put upon notice of said Gilbert's fraudulent intent.

Your orator further charges, as an evidence of respondents'
12 knowledge of Gilbert's fraudulent intent and as evidence of their participation therein, that shortly prior to this time the said respondent, J. D. Wall, had told Frank Guildener, C. F. Cuthrell, and others that said Gilbert was insolvent and would fail.

Your orator further charges that on the 11th day of Octo., A. D. 1899, the representative of R. G. Dunn & Co., W. J. Roberts, the agent for a large number of creditors of the said W. H. Gilbert, after being informed that this pretended and proposed sale was being considered by respondents, went to T. W. Huske, one of the respondents, demanding of him to know the particulars of same and stated that he had parties interested and desired to notify them in order that they might be in a position to protect themselves, and that said parties were large creditors of Gilbert; that the said Huske, respondent, as aforesaid, refused to give him any information, although specially requested so to do; that thereafter, when the pretended transfer and conveyance had been consummated and the paper-writing purporting to be a deed or bill of sale, had been executed, — sent for the said W. J. Roberts, and as he was approaching him the said Huske shook *and* bill of sale at the representatives of creditors and told him that they had bought; that immediately thereafter they went into possession of the stock of goods and property described, as aforesaid, and within a few minutes thereafter the said Gilbert had boarded the train and left for parts unknown, and was out of the reach of his creditors.

Your orator further charges, as knowledge of the fraudulent intent of the respondents, that they knew or believed, or could have ascertained by exercising reasonable and ordinary prudence, that the Wachovia national bank intended to obtain an unlawful preference by means of this conveyance, transfer, and assignment and the exe-
13 cution of the aforesaid paper-writing purporting to be a deed or bill of sale for this property; that it was well known to the said respondents that the said bank would obtain the payment of their debt in full, and that the amount of money they

alleged to have paid to the said Gilbert, bankrupt, was not sufficient to discharge the remainder of his indebtedness in full or pay 50 % thereof.

Your orator further charges that respondents did not pay a present fair consideration for the stock of hardware, store fixtures, and accounts belonging to and due the said Gilbert, bankrupt, mentioned and described in the paper-writing purporting to be a deed or bill of sale. You- orator expressly charges that at the date of execution of the paper-writing and at the date of the alleged transfer and conveyance and assignment that the actual value of said stock of goods, store fixtures, and accounts was from $17,000 to $18,000, and the said paper-writing purporting to be a deed or bill of sale therefor purports only a consideration of only $8,000, which amount, if actually paid, would be less than 50 % of the real value of the stock of hardware, store fixtures, and accounts alleged to have been conveyed.

Your orator further expressly charges that the sum of $8,000 was not absolutely and unconditionally paid to the said W. H. Gilbert by respondents for the said stock of hardware, store fixtures, and accounts due him, as appears by the said paper-writing purporting to be a deed or bill of sale.

Your orator further charges that the said respondents are threatening to intermingle and move and have already intermingled a portion of this stock of hardware with their own stock of hardware;
that they are threatening to sell and dispose of and have
14 disposed of a portion of the said stock; that they have collected and are threatening to collect the accounts due and owing the said bankrupt, W. H. Gilbert.

Your orator further charges that the respondents have or formerly had documents in their possession, viz., the books, accounts, invoices, files of letters and statements, and inventories belonging to the said W. H. Gilbert, which, if procured, would show the truth of your orator's case, and that they ought to give a schedule of them and produce them for inspection and proof; that respondents failed and neglected to make any enquiries as to Gilbert's financial condition or as to his purpose of his fraudulent transfer, and actually shut their eyes to the facts and circumstances showing or tending to show that he owed large sums of money, was insolvent, and intended the fraud that was actually committed.

Your orator further charges that no itemized or accurate inventory of the said stock of hardware has ever been taken, and your orator will suffer irreparable loss and damage by allowing and permitting the said respondents to continue to dispose of or sell the stock of hardware, to intermingle same with their own stock of hardware, or to collect the accounts due and owing the said bankrupt, W. H. Gilbert; that it will be impossible to distinguish this stock of hardware from the other stock of hardware belonging to Wall & Huske, since no inventory has been taken, it will be impossible to estimate accurately the amount of said stock after being so disposed of or intermingled with their other stock.

Your orator further charges that your respondents are men of

small means as compared with the value of the stock of hardware claimed and cannot respond in damages to your orator for
15 the value of the said stock of goods if sold or intermingled, and your orator charges that the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, ought to be restrained by injunction from selling, disposing of, or intermingling or otherwise interfering with the said stock of hardware or the accounts due and owing to the said W. H. Gilbert, bankrupt, and that some proper person ought to be appointed by this court to collect in said accounts and dispose of the said stock of goods; and your orator further charges that an account ought to be taken between the complainant and the respondents to ascertain the amount of said stock of goods so disposed of, intermingled, and sold heretofore, and also the amounts collected by the respondents from the accounts.

All of which actings, doings, and pretenses of the said respondents are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator.

In consideration whereof and forasmuch as your orator is remediless in the premises at and by the strict rules of common law and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that said respondents may, if they can, show cause why your orator should not have the relief hereby prayed, and may upon their separate and respective corporal oaths and according to the best and utmost of their respective knowledge, information, and belief full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth as by note hereunder written they are respect*fu*lly required to answer—that is to say:

(Here follows ninety-three interrogatories—omitted.)

16 And that the alleged sale heretofore set out be decreed by this honorable court to be fraudulent and void under and by virtue of the acts of Congress relating to bankruptcy, entitled "An act to establish a uniform system of bankruptcy throughout the United States," sec. 67 (*e*) thereof, and that the said sale, as alleged, *to* be set aside as fraudulent and void, as made with intent to hinder, delay, and defraud the creditors of the said W. H. Gilbert as to this complainant, and that said property be decreed to belong to and pass to this complainant as a part of the estate of the said W. H. Gilbert, bankrupt; that the paper-writing bearing date of Oct. 11th, 1899, executed by the said W. H. Gilbert to the respondents, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, be declared null and void, and that the same be surrendered up and cancelled by order of this honorable court, and that in the meantime that the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, respondents, and each of them, their agents, employees, and attorneys, be restrained and enjoined from selling, disposing of, or intermingling, or in any manner from interfering with said stock of goods described heretofore and mentioned in the same paper-writing purporting to be a deed or bill of sale until the further order and decree of this court in the premises.

And that some proper person be appointed to receive and collect

all moneys and dispose of the stock of goods which may be coming from the said stock of hardware and store fixtures and accounts, as aforesaid.

That an accounting be had as to the said stock already disposed of and intermingled, and that your orator may have such fur-
17 ther relief in the premises as the nature of the circumstances of the case may require and to your honors may seem meet.

And may it please your honors to grant unto the complainant a writ of injunction, &c.

May it please your honors to grant unto the complainant a writ of subpœna, to be addressed to the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, thereby commanding them and each of them, at a certain time and under a certain penalty therein limited, personally to appear before this honorable court, and then and there full, direct, and perfect answers make to all and singular the premises, and further to stand to, perform, and abide such further decrees, directions, and orders therein as to this honorable court shall seem agreeable to equity and good conscience.

WALTER O. COX, *Trustee.*

A. H. ELLER,
JONES & PATTERSON,
LOUIS M. SWINK,
Att'ys for Complainant.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

On this the 5th day of December, 1899, before me personally appeared Walter O. Cox, trustee, the above-named complainant, who made solemn oath that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

SAM'L L. TROGDON, *Clerk.*

(Here follows numbers of interrogatories required to be answered by J. D. Wall and T. W. Huske respectively—omitted.)

Endorsed: Filed in this office Dec. 15, 1899, 7.30 p. m. Sam'l L. Trogdon, clerk.

18 *Supplemental Bill of Complaint.*

In the District Court of the United States for the Western District of North Carolina. In Bankruptcy.

WALTER O. COX, Trustee of W. H. Gilbert, Trading as Winston Hardware Co. and as Gilbert Hardware Co., a Bankrupt, Complainant,

vs.

J. D. WALL & T. W. HUSKE, Partners, Trading as Wall & Huske, Respondents.

To the honorable the judge of the district court of the United States for the Western District of North Carolina:

Your orator, Walter O. Cox, trustee of the estate of W. H. Gilbert, trading as Winston Hardware Co. and as Gilbert Hardware Co., a bankrupt, and a citizen and resident of said State of North Carolina and district aforesaid, shows unto your honor that he has already filed in the district court of the United States for the western district of North Carolina, sitting as a court of bankruptcy, the court having jurisdiction of J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, being citizens of said State and inhabitants of said district, a bill of complaint against the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, seeking to set aside a certain sale of a stock of hardware made by the bankrupt, W. H. Gilbert, to the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, and also for the purpose of cancelling of a certain paper-writing purporting to be a bill of sale or deed, executed by the said bankrupt to the said respondents, under date of Octo. 11th, A. D. 1899, and also for other relief, as appears more fully

19 by an inspection of the original bill of complaint filed in the said cause: that the property so transferred or sold, to wit, the stock of hardware, store fixtures, and accounts, is within this district and in the jurisdiction of this court.

Your orator respectfully refers to said bill of complaint for a more particular statement of the contents thereof, and you- orator files herewith a true copy of said bill of complaint and pray- that your honor will take the same as a part of this ancillary bill. Your orator further shows that all the statements contained in said bill are true, as he is informed and verily believes, and he repeats the same herein.

And your orator shows to your honor that the process in said bill was been duly issued and served upon the respondents therein named, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, by the marshal of this honorable court.

And your orator further shows that the property in question is a large and valuable stock of hardware, store fixtures, and accounts, and that said property, as aforesaid, is deteriorating in value and damaging by reason of being stored in the building known as the Vaughn building, in the city of Winston, N. C., and your orator

further shows to your honor that the cost of storage of the said property amounts to about $50.00 per month, besides the other necessary expenses, such as insurance, &c.

And your orator further shows that no inventory has ever been taken of said property, and there is no way known unto your orator to come to a fair and equitable valuation of said property, and your orator further shows that the respondents are threatening to dispose of, sell, and intermingle, if permitted to do so, without taking or permitting to be taken any inventory of said property; that the respondents are men of small means, having bought or pre-
20 tended to buy said stock of goods, fixtures, and accounts wholly on credit, and cannot respond to your orator in damages even if the true inventory and value of the said stock was known, by which means your orator will suffer irreparable loss and damages if the said stock is permitted to be sold, intermingled, or otherwise disposed of by the said respondents.

For these reasons and for the other and further good and sufficient reasons, as appears by the copy of the original bill of complaint hereto attached, your orator prays this honorable court to issue a notice to said respondents to show cause, if any they have, why a receiver should not be appointed by this honorable court to dispose of and sell the said stock of goods and hold the funds so derived from such sale until the determination of this litigation; that the accounts, store fixtures, etc., all be reduced to money under the orders of this honorable court, and that the funds be held until the termination of this litigation.

Your orator further prays that an injunction issue from this honorable court, commanding and restraining the respondents from selling, disposing of, or intermin-ling, or in any manner interfering with the said property until the further orders of this honorable court.

WALTER O. COX, *Trustee.*

A. H. ELLER,
LOUIS M. SWINK,
JONES & PATTERSON,
Att'ys for Complainant.

Walter O. Cox, being duly sworn, deposes and says that he has read the foregoing, and that the same is true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to such matters he believes it to be true.

Witness my hand and official seal this the 12th day of Dec., 1899.

[SEAL.] FRANK F. JONES,
Notary Public.

21 Endorsed: Filed in this office Dec. 16, 1899. Sam'l L. Trogdon, clerk.

Exhibit to the supplemental bill of complaint is a copy of the original bill of complaint, and under direction of respondents' counsel it is not copied again.

January 27th, 1900.

SAM'L L. TROGDON, *Clerk.*

22 The defendants, Wall & Huske, at the time of filing the subpœna and bill of complaint and supplemental bill of complaint were in possession of the said stock of goods, holding same under a bill of sale from W. H. Gilbert.

That on the supplemental bill of complaint filed his honor Judge Ewart issued an order to defendants, Wall & Huske, on the 15th day of December, 1899, to appear before him, at Charlotte, N. C., on the 18th day of December, 1899, and show cause, if any, why a receiver should not be appointed by the court to take in charge the stock of goods described in the bill of complaint, and an injunction was issued by his honor restraining defendants from disposing of the stock until the further order of the court, etc.

By consent, said hearing was postponed, to be heard at Winston, on the 9th day of January, 1900.

At expiration of the injunction, as per order of Judge Ewart of November 6th, 1899, counsel of Wall & Huske agreed that stock of goods should not be removed until Cox, trustee, should qualify and bring suit, as if injunction in force.

The defendants, Wall & Huske, filed on the 6th day of January, 1900, the following plea and demurrer:

In the District Court of the United States for the Western District of North Carolina. In Bankruptcy.

WALTER O. COX, Trustee of W. H. Gilbert, Trading as Winston Hardware Company and as Gilbert Hardware Company, a Bankrupt, Complainant,

vs.

J. D. WALL and THOS. W. HUSKE, Trading as Wall & Huske, Defendants.

To the Honorable Hamilton G. Ewart, judge of the district court of the United States for the western district of North Carolina:

23 The defendants in the above-entitled cause, answering the affidavits filed in the cause by complainant on the 12th day of December, 1899, upon which defendants moved for a receiver to be appointed of the stock of goods now in the possession of the defendants and purchased by them from W. H. Gilbert, say:

I.

That they admit the complainant filed in the district court of the United States for the western district of North Carolina a bill of complaint against defendants seeking to set aside a certain sale of the stock of hardware made by W. H. Gilbert to the defendant; all of which will appear by the said bill of complaint and an inspection thereof.

The defendants admit that the stock of hardware, store fixtures, and accounts *is* within this district, to wit, *is* situated in the city of Winston, in a storehouse and warehouse therein.

Defendants further admit that a subpœna has been duly served upon these defendants, issued by the district court of the United States aforesaid at the time of filing said bill of complaint.

Defendants further admit that the stock of hardware, store fixtures, and accounts *is* of value as appears in an answer of these defendants, to which reference is made and which will be duly filed in this cause should the court demand a filing of said answer after hearing the motions and demurrers and pleas of these defendants as will be presented.

Defendants admit that said property is deteriorating in value and damaging by reason of being locked up in a storehouse and warehouse under the restraining order of the court obtained at the
24 instance of the creditors of the bankrupt, W. H. Gilbert, the creditors aforesaid being the same as obtained the appointment of the complainant as trustee of W. H. Gilbert, bankrupt, and who obtained the issuing of the subpœna and obtained the filing of the bill of complaint in the said action.

(25.) Defendants deny that no inventory ever was taken of said property, and that there is no way to come to a fair and equitable value thereof.

Defendants say that they are not now threatening to dispose of or sell said property by reason of the injunction of this court; that they have not in any way intermingled the goods purchased by them from W. H. Gilbert with their own stock of hardware, and that the only removal of goods which has been made from one store to the other appears fully in Exhibits 1 & 2 and 3, hereto attached.

Defendants admit that they are men of no very large means, but aver that they are responsible and able to pay any damages and amounts which may be adjudged against them by this court or any other court by reason of their disposition of said goods.

Defendants deny that they have pretended to buy the said property from said W. H. Gilbert, but allege and aver that they have actually purchased and paid for same, as appears by their answer, to which reference is made aforesaid.

Defendants deny that the complainant will suffer any irreparable loss or damage if the stock is permitted to remain in the possession of defendants or be disposed of by them.

And in support of this plea of defendants they respectfully refer to their answer as an aid of this their plea.

25

II.

Defendants, specially appearing under protest of the purpose of this plea, and for no other, say:

That the complainant, as trustee, if he has any right to the stock of goods described, has a plain, clear, and adequate remedy at law to recover same from these defendants, and is not entitled to evoke the aid of the equitable jurisdiction of this court to enforce the right, and that this honorable court, sitting as a court of equity, has no jurisdiction to hear and determine the question as a court of equity.

Defendants further say that the district court of the United States for the western district of North Carolina has no jurisdiction to en-

tertain this bill of complaint, or to determine the question arising between the complainant, as trustee in bankruptcy of W. H. Gilbert, and these defendants.

That these defendants hold and claim title to the said property described in complainant's bill under a purchase from W. H. Gilbert prior to the institution of the proceedings in bankruptcy against W. H. Gilbert.

That both W. H. Gilbert, the complainant trustee, and these defendants were, at the time of filing said bill of complaint, and now are, citizens of the State of North Carolina, and that the defendants do not consent to the jurisdiction of this court.

Wherefore these defendants pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the bill of complaint herein, or to this motion for the appointment of a receiver, or for an injunction, or for any of the
26 matter- and things therein contained, and pray that the motion of complainant for (26) the appointment of a receiver and for this injunction be denied by this honorable court, and that they be hence dismissed with their reasonable cost in this behalf sustained.

And, further, defendants pray that the original bill of complaint filed herein be dismissed by this honorable court and that these defendants recover their reasonable cost in this behalf sustained.

JOHN D. WALL.
T. W. HUSKE.

GLENN & MANLY,
Attorneys for Defendants.

UNITED STATES OF AMERICA,)
Western District of North Carolina,) *ss:*

At Winston, in this district, on the — day of January, 1900, personally appeared before me John D. Wall and Thomas W. Huske, defendants herein, who, being severally duly sworn, depose and say that they have read the foregoing plea by them subscribed and know the contents thereof, and that the facts set forth in the plea are true of their own knowledge, except such matters as are therein stated on information and belief, and as to those they believe them to be true, and that this plea is not interposed for delay.

JOHN D. WALL.
T. W. HUSKE.

Sworn to and subscribed before me this the 6th day of January, 1900.

[SEAL.] W. I. BROOKS,
Notary Public.

27 We hereby certify that in our opinion the foregoing plea to the jurisdiction of the court is well founded in point of law.

WATSON, BUXTON & WATSON,
GLENN & MANLY,
Of Counsel for Defendants.

The motion for receiver and injunction was heard before his honor H. G. Ewart, judge, at Winston, on the 9th day of January, 1900, on the bill of complaint, supplemental bill of complaint of Cox, trustee, and the plea and demurrer of Wall & Huske; affidavits of both sides in support of and against motion for receiver. Argument of counsel was made on both sides. On the 15th day of January, 1900, his honor rendered judgment overruling the demurrer of Wall & Huske and appointing a receiver, as appears from the following order:

28

Order.

"In the above-entitled cause the plea to the jurisdiction of the court filed by respondents is overruled. On the reading and consideration of the bill of the plaintiff and answer of respondents, it is ordered, adjudged, and decreed that the injunction issued by this court December 16th, 1899, be continued until the final hearing of this cause, and the respondents are hereby enjoined and restrained from interfering in any manner with the stock of goods described in the bill of the plaintiff, the same being the identical stock of goods alleged to have been purchased by respondents of W. H. Gilbert, bankrupt.

Samuel F. Vance, of the city of Winston, N. C., is hereby designated and appointed as temporary receiver to take into his possession the said stock of goods described in the bill of complaint."

On the 15th day of January, 1900, his honor filed an opinion in support of the order of the 13th instant, in which he says:

"This is a bill in equity, filed by the complainant as trustee of the bankrupt, for the purpose of settin- aside a sale made by the bankrupt, Gilbert, to the respondents of a certain stock of hardware, the said sale having been made, as complainant alleges, in fraud of the bankruptcy act and in fraud of the creditors of the said estate. The facts are as follows:

The respondents demurrer to the bill filed in this case, raising the question of the jurisdiction of the district court to entertain this cause. It is claimed that as the bankrupt, the trustee, and
29 the respondents are all citizens of this State and residents of this district that by section 23 B of the act cognizance of such a controversy can only be taken by the State courts."

A careful examination of the cases decided satisfies me that the section referred to, to wit, 23 *b*, providing that "suits by the trustee shall only be brought or prosecuted in the court where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is a limitation upon the jurisdiction of circuit courts of the United States and does not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act, and that a court of bankruptcy has jurisdiction of a suit by a trustee to recover property alleged to have been conveyed or transferred in fraud of his creditors, notwithstanding that the trustee and the bankrupt and the defendants are all citizens of the State.

The defendants, Wall & Huske, desiring a review of the order overruling their demurrer, duly filed in the United States circuit court of appeals on the 22nd day of January, 1900, a petition asking the supervisory power of the court under the act of Congress of 1898, known as the bankrupt act.

That in the circuit court of appeals the complainant filed a demurrer, which speaks as follows:

The demurrer of the above-named plaintiff, Walter O. Cox, trustee of W. H. Gilbert, trading as Winston Hardware Company and as Gilbert Hardware Company, a bankrupt, to the petition of the above-named defendants.

30 1. That it appeareth by the petitioner's own showing in the said petition that the only question involved or at issue and heard and passed upon by Judge Ewart and the only ones asked to be revised by this court are:

(1.) As to the jurisdiction of the United States district court for the western district of North Carolina, sitting as a court of bankruptcy, to entertain a plenary suit between the complainant, W. O. Cox, trustee, and the defendants for the possession of the goods in controversy.

(2.) As to the jurisdiction of the said court to entertain a bill of equity for the relief sought by the complainant, W. O. Cox, trustee.

The cause was heard before the circuit court of appeals at February term, 1900, as on appeal, counsel for complainant and defendants agreeing that the record presented fully the question of review and should be heard on the merrits of the matters sought to be reviewed.

It is agreed that the cause was heard before his honor Judge Ewart on demurrer of defendants to the jurisdiction of the United States district court, and that the cause was heard before the United States circuit court of appeals on demurrer to the jurisdiction of the United States district court without objection from complainant as to form of plea, except complainant did make this objection on the argument made on the rehearing.

On the 1st day of May, 1900, the circuit court of appeals filed an opinion sustaining the jurisdiction of the United States district court for the western district of North Carolina and duly reported in Federal Reporter, vol. No. 101, page 403.

31 The defendants, Wall & Huske, on the 2nd day of June, 1900, filed a motion to rehear, to the end that the decree of the United States circuit court of appeals aforesaid, affirming the order of the district court aforesaid, might be reversed.

Motion to rehear was granted on the 9th day of July, 1900, and the cause having now come on for argument at the November term, 1900, of the said circuit court of appeals for the fourth circuit before the undersigned, and said court desiring, for its proper decision, the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said cause:

Now, therefore, we, the undersigned, do hereby certify said ques-

tions or propositions of law to the Supreme Court of the United States for instruction as aforesaid.

First. Under the facts and the pleadings above stated, had the district court of the United States for the western district of North Carolina jurisdiction over the controversy?

Second. Said district courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings instituted either by the original petitioners, the receiver of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property, thus in the
32 court's possession, and do full and complete justice in one litigation?

Witness our hands this 27th day of November, in the year 1900.

NATHAN GOFF,
Senior Circuit Judge.
CHARLES H. SIMONTON,
Circuit Judge.
EDMUND WADDILL, JR.,
District Judge.

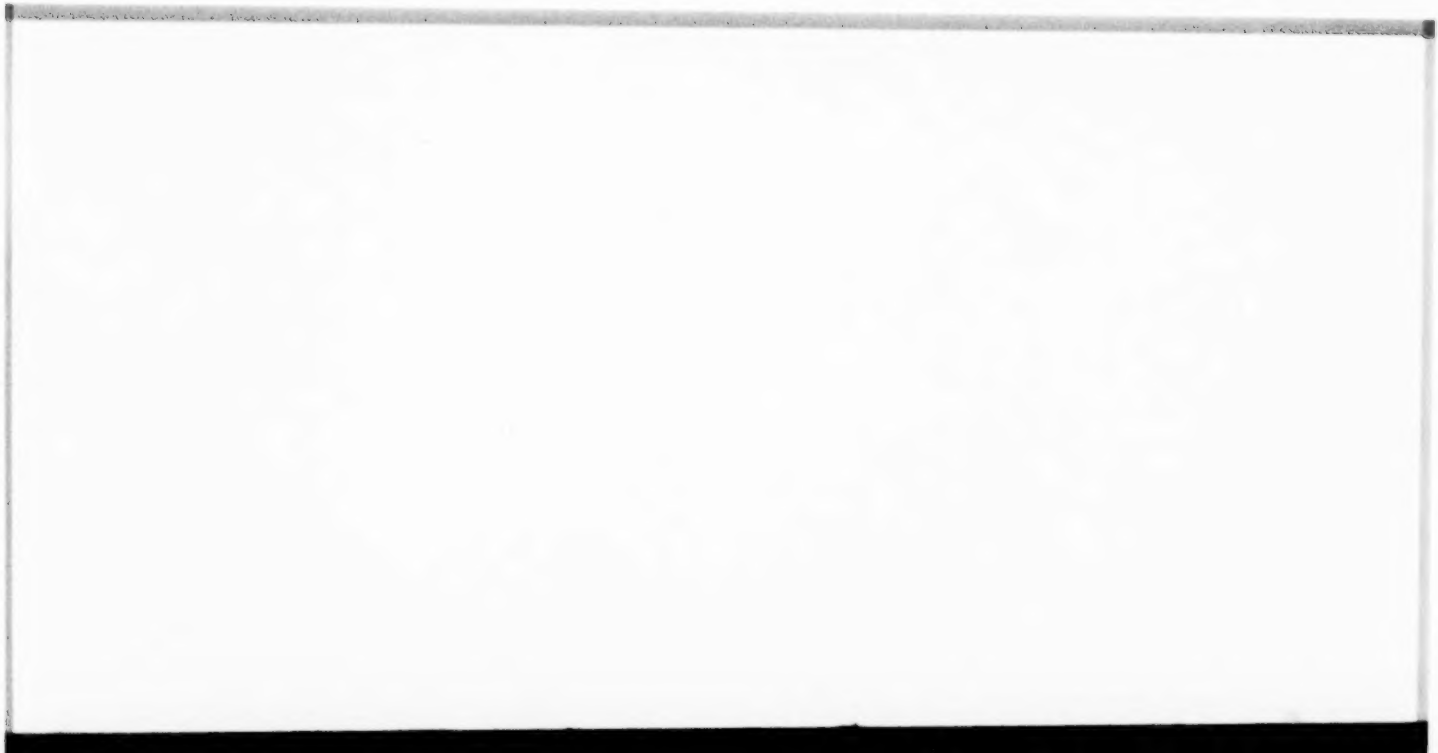
I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the original certificate of the questions of law certified to the Supreme Court of the United States, filed and now remaining of record in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said U. S. circuit court of appeals for the fourth circuit, at Richmond, this 3rd day of December, in the year of our Lord one thousand nine hundred.

Seal United States Circuit Court of Appeals, Fourth Circuit.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Ct.

Endorsed on cover: File No., 17,989. U. S. C. C. of appeals, 4th circuit. Term No., 504. John D. Wall and Thomas W. Huske, trading as Wall & Huske, appellants, *vs.* Walter O. Cox, trustee of W. H. Gilbert, trading as Winston Hardware Company and as Gilbert Hardware Company. Filed December 10th, 1900.



Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 504.

JOHN D. WALL AND THOMAS W. HUSKE, TRADING AS WALL & HUSKE, APPELLANTS,

vs.

WALTER O. COX, TRUSTEE OF W. H. GILBERT, TRADING AS WINSTON HARDWARE COMPANY AND AS GILBERT HARDWARE COMPANY.

BRIEF OF APPELLANTS.

Wall & Huske, appellants, respectfully present the following in support of their contention:

STATEMENT OF FACTS.

The record in this cause supporting the questions, certified for the consideration of this court, presents the following facts:

That W. H. Gilbert, a citizen of Winston, N. C., was doing a hardware business in said city, and on the 11th day of October, 1899, sold and delivered to Wall & Huske, hardware merchants in the same town, a stock of goods,

consisting of hardware, and executed to the said Wall & Huske a bill of sale therefor:

That thereafter, to-wit: on the 13th day of October, 1899, certain creditors of W. H. Gilbert filed a petition in the District Court of the United States for the Western District of North Carolina, sitting as a Court of Bankruptcy, asking that said W. H. Gilbert be declared a bankrupt: That on the 14th day of October, 1899, His Honor, H. G. Ewart, Judge of the United States District Court, made an order in said bankruptcy proceedings, restraining Messrs. Wall & Huske from disposing of said stock of goods until the further order of the Court, and on the 27th day of October, 1899, said Court declared W. H. Gilbert a bankrupt, and on the 6th day of November, 1899, said Court, by order, restrained said Wall & Huske from further disposition of the goods "until the appointment and qualification of a trustee of W. H. Gilbert, bankrupt".

Said order further provided, that,

> "Upon the appointment and qualification of said Trustee, in a proper case and upon the proper showing, an injunction or restraining order may be obtained upon application, in which Wall & Huske, defendants above named, may be made parties, restraining the sale or other disposition of any of the property until a hearing may be had and the matter at issue determined either by a suit in equity or action at law in the United States Courts or the Courts of the State, as petitioners may be advised."

That on the 23rd day of November, 1899, W. O. Cox was, by the creditors of the said W. H. Gilbert, bankrupt,

duly elected as Trustee of said bankrupt, and duly qualified as such, and on the 6th day of December, 1899, began a suit in equity, and duly filed in the District Court of the United States for the Western District of North Carolina, sitting as a Court of Bankruptcy, a Bill of Complaint, and caused a subpœna to be issued and the same duly served on Wall & Huske; in which suit, he sought to set aside the sale of the goods to Wall & Huske, as fraudulent and void, and to recover the said stock of goods.

On the Bill of Complaint and a supplemental complaint filed by complainant in this suit, His Honor, Judge Ewart, by an order, dated December 16th, 1899, restrained the said Wall & Huske from disposing of said stock of goods until the further order of the Court, and ordered notice to be given them to show cause why a Receiver should not be appointed of said stock of goods.

The defendants expressly declined to consent to the jurisdiction of the United States District Court, and demurred to the Bill of Complaint, alleging as a cause of demurrer:

> First—That the District Court of the United States had no jurisdiction to entertain a plenary action for the recovery of the said stock of hardware against the defendants, Messrs. Wall & Huske.
>
> Second—That if the Court had jurisdiction to entertain a plenary suit between the Trustee and a third person claiming title to said property, that the action should be by an action at law, and not by a suit in equity.

That W. H. Gilbert, W. O. Cox, Trustee, and Wall & Huske were, at all times during the pendency of the action aforesaid, citizens of the State of North Carolina, and residing in the Western District of said State.

Pursuant to notice and order of the Court heretofore made, the cause, on the Bill of Complaint and on demurrer of defendants, was duly heard at Chambers in Winston, N. C., on the 9th day of January, 1900; all parties being represented by counsel.

Complainant moved for an injunction until the final hearing of the cause and for a Receiver. His Honor, on the 15th day of January, 1900, filed an order in said cause, granting an injunction and appointing a Receiver, as appears of record.

Appellants, Wall & Huske, sought to have the order of His Honor, Judge Ewart, reviewed in the Circuit Court of Appeals for the Fourth Circuit, and the cause was heard as on appeal by said Circuit Court of Appeals, at the February Term, 1900, and a judgment of said cause filed on May 1st, 1900, sustaining the order of the United States District Court appealed from, and declaring that the District Courts of the United States had jurisdiction to entertain a plenary suit in equity to recover the stock of goods from Wall & Huske.

Federal Reporter, vol. 101, page 403.

On the decision of this Court in Bardes vs. National Bank of Hawardin, U S. Rep., vol. 178, page 524, presently filed, a motion to rehear the cause was heard at November Term, 1900, of said Circuit Court of Appeals. On this motion, the Court sends its certificate to this Court asking on the record, its direction, and submitting two questions, as follows:

FIRST—Under the facts and the pleadings above stated, had the District Court of the United States for the Western District of North Carolina jurisdiction over the controversy?

SECOND—Said District Courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a Receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings, instituted either by the original petitioners, the receiver of the court, the bankrupts trustee, or of the courts own motion, jurisdiction to bring in the alleged fraudulent transferree of the property, thus in the courts possession, and do full and complete justice in one litigation?

FIRST QUESTION.

The first question is as follows:

> *Under the facts and the pleadings above stated, had the District Court of the United States for the Western District of North Carolina jurisdiction over the controversy?*

The record of the cause in this Court clearly shows that the first question is

> "Can the District Court of the United States entertain jurisdiction over suits brought by a trustee in Bankruptcy to set aside fraudulent transfers of property made

by the bankrupt to third parties, before the institution of the proceedings in bankruptcy?"

The answer is squarely given in the decision of this Court in Bardes vs. Bank of Hawardin *supra*, in which the same question and other similar questions are discussed, and the decision of this Court, after consideration of all of the provisions of the Bankrupt Act relating to jurisdiction under said act, says, that the United States Court has no jurisdiction.

STATUS OF DECISIONS BEFORE BARDES CASE.

Before the rendition of the decision by this Court in Bardes vs. Bank *supra*, there was some diversity of opinion in the Courts of the United States as to the right of the Trustee in Bankruptcy to bring such plenary suit, and Sec. 23, Sub Sec. b, was differently construed.

Among the decisions of the United States Court cited as authority for such jurisdiction are the following:

In re Gutwillig, Fed. Rep., vol. 92, page 337.
Davis vs. Bohl, " " " 92, " 525.
In re Fixen, " " " 96, " 753.
In re Richards, " " " 94, " 636.
In re Newberry, " " " 97, " 24.
Carter vs. Hobbs, " " " 92, " 59.
In re Seivers, " " " 91, " 366.
and others.

Contra,

In re Abraham, Fed. Rep., vol 93, page 768.
Burwell vs. Merchantile, Fed. Rep., vol. 91, page 365.

Mitchell vs. McClure, Fed. Rep., vol. 91, p. 621,
Hicks vs. Knost, " " " 94, p. 625,
Heath vs. Shaffer, " " " 93, p 647,
and others.

The above cases are not mentioned herein as authority, but merely for the purpose of showing the conflict of opinion before this Court had spoken and defined the jurisdiction of the United States District Court in such suits.

It was contended by the appellee and intimated by one of the members of the Circuit of Appeals on the rehearing, that the proceedings in which W. H. Gilbert was declared a bankrupt was an *involuntary* proceeding, which distinguished this case from Bardes vs. Bank and Mitchell vs. McClure and Hicks vs. Knost, which two last-named cases follows the first named case in U. S. Rep., vol. 178. Nowhere in the provisions of the Bankrupt Act can you find such a distinction. The language of the Statute is,

"Suits by Trustees shall only be brought", etc., see Sec. 23, b. Not a word is contained in the Act of Congress intimating that any difference between a *voluntary* proceeding and an *involuntary* proceeding is contemplated by the Act. No reason can be given why the manner in which the debtor was declared a bankrupt, should change the jurisdiction of the Court in a suit by the Trustee: certainly it can make no difference to the defendant in such a suit, as he was a stranger to the bankruptcy proceedings, and had nothing to do with the mode in which the debtor was declared a bankrupt, or of the appointment of a trustee. Any rights which the defendant had under the provisions of this Act of Congress, should not be prejudiced by the conduct of others in a proceeding to which he was not a party. This attempted distinction has

found no weight with the Court, so far as I can discover: The contrary is held by Judge Lowell, District Judge of Massachusetts.

In re Ward, Fed. Rep., vol. 104, page 985.

In this interesting opinion of Judge Lowell, he discusses the suggested distinction of voluntary and involuntary proceedings, and concluded there is nothing in such a distinction warranted by the act or by reason.

It was contended by Apellee that when the specific Act complained of as fraudulent was itself the "act of bankruptcy" that the United States District Court had jurisdiction in such cases to entertain a plenary suit. But in Bardes vs. Bank, *supra*, the act complained of was an "act of bankruptcy", and this Court denies jurisdiction to the District Court aforesaid.

SECOND QUESTION.

The second question is as follows:

> *Said District Court having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings instituted either by the original petitioners, the receiver of the Court, the bankrupt's trustee, or of the Court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property, thus in the Court's possession, and do full and complete justice in one litigation?*

The modes of procedure in Bankruptcy Proceedings elicited from this Court by this second question, I respectfully submit, are not raised by this record, and whether this Court will give direction for the conduct of parties under a different state of facts, I do not infer from its former rulings. There is only one question presented by the record as I understand it, and that question is contained in the first question heretofore discussed.

The record on page 17 says:

> "It is agreed that the cause was heard before His Honor, Judge Ewart, on demurrer of defendants to the jurisdiction of the United States District Court, and that the cause was heard before the United States Circuit Court of Appeals on demurrer to the jurisdiction of the United States District Court."

That the matter of the jurisdiction of the United States District Court to entertain a plenary suit to set aside a transfer of property by the bankrupt to a third party made before the institution of bankruptcy proceedings was the sole question considered, or raised by the record, we respectfully refer to the opinion of Judge Waddill in this cause.

Fed. Rep., vol 101, page 403.

Where the Circuit Court of Appeals decides only the one question as to the right of the United States District Court to entertain a plenary suit by Cox, Trustee, to recover the goods from Wall & Huske.

A careful examination of the record sent to this Court

will disclose that there were no facts in this case which present the Second Question, or make its answer necessary to a determination of the case at bar.

The second question pre-supposes that the Court adjudicating the bankruptcy, had in the bankruptcy proceedings taken charge of the property and appointed a receiver and had the property in its possession. The question is then asked:

Would the Court not bring in the parties, Wall & Huske, and adjudicate their rights in one action?

This does not comport with the facts. The Bankrupt Court was not in possession, or charge of the property; nor was a Receiver appointed of the property in said bankruptcy proceedings, but on the other hand, the property, according to the record and the truth, was in the actual possession of Wall & Huske, when this bankruptcy proceeding was instituted; also when the debtor was declared a bankrupt; also when the trustee was appointed; and also when the suit was instituted by the trustee for its recovery. Further, the appointment of the receiver was not made in the bankruptcy proceeding at all but was made in the equity suit of Cox, Trustee, vs. Wall & Huske by motion in said suit, which motion was made by complainant Cox, Trustee; and the very question at issue is: Did the Court have jurisdiction to entertain the suit of Cox, Trustee? If it did not, then the suit fails and all orders in said suit are void and the appointment of a Receiver in said suit is void. The record says:

> "The motion for receiver and injunction was heard before His Honor, H. G. Ewart, Judge, at Winston, N. C., on the 9th day of January, 1900, on the bill of complaint, supplemental bill of complaint of Cox,

> Trustee, and the plea and demurrer of Wall & Huske; affidavits of both sides in support of and against motion for Receiver. Argument of counsel was made on both sides. On the 15th day of January, 1900, His Honor rendered judgment, overruling the demurrer of Wall & Huske and appointing a receiver, as appears from the following order:"

It is true there was an injunction issued by the District Court, on motion of the petitioners, in the bankruptcy proceedings, restraining Wall & Huske from disposing of the property and this order was made before the institution of this suit, but the District Court or Bankrupt Court did not take charge of the property, for in the order of the District Court, Wall & Huske were restrained from disposing of the property, "Until the appointment and qualification of a Trustee, * * * who might seek to recover the property by bringing his suit in equity or action at law in the United States Courts or the Courts of the State as petitioners might be advised".

The Trustee was duly appointed and qualified, brought his suit in equity in the United States District Court to declare void the transfer from Gilbert to Wall & Huske and to recover the stock of goods. In this suit, according to the opinion of this Court, he sought the wrong forum.

In this case Wall & Huske had purchased the stock of goods from one Gilbert, and had them in possession, subsequently Gilbert was adjudicated a bankrupt on petition of his creditors; the Court, at the instance of the creditors, restrained Wall & Huske from disposing of said goods until a proper party, to-wit, a trustee in bankruptcy could be appointed, that such trustee might, in the proper court,

test the validity of the purchase by Wall & Huske. There was no taking the property by the referee of the Court or by any one else, as the property of the bankrupt, and the property never got into the Bankrupt Court as the second question pre supposes, but the property was in the possession of Wall & Huske and so remained until it was taken into possession by a Receiver of the United States District Court appointed by motion in the cause of Cox, Trustee, against Wall & Huske, a suit instituted for the purpose of getting the property.

Again, the second question pre-supposes that the Bankrupt Court was in possession of the property.

Now, the suit of Cox, Trustee, was brought against Wall & Huske and the Bill of Complaint alleges that Wall & Huske "went into possession of the entire property" as aforesaid.

The Bill of Complaint further alleges:

> Your orator further shows to your Honor that he has requested the respondents J. D. Wall and T. W. Huske, partners, trading as Wall & Huske to deliver up the said property to him as such trustee, * * * * and surrender up and cancel the paper writing purporting to be a deed or bill of sale for same. * * * * * That the respondents allege and pretend that the transfer, conveyance, and assignment is valid, * * * * * and that by reason of said conveyance, * * * * * they acquired title to said property therein described, and that they were purchasers in good faith and for a present fair consideration
>
> Record, page 5.

> Your orator further charges that the said respondents are threatening to intermingle and move and have already intermingled a portion of this stock of hardware with their own stock of hardware: that they are threatening to sell and dispose of and have disposed of a portion of the said stick: that they have collected and are threatening to collect the account due and owing the said bankrupt, W. H. Gilbert.
>
> Record, page 8.

Now, according to complatnants' own allegations set forth in his bill, Wall & Huske were, at the time of filing the same, in possession of the stock of goods, treating them as their own, refusing to surrender them to Cox, Trustee, and the prayer of complainant Cox is, that the goods be recovered by him. This being true, how is it possible for the goods to be in the possession of the Bankrupt Court at the time of the institution of the suit by Cox, Trustee?

As a matter of fact the goods at that time were in possession of Wall & Huske, and they parted with their possession only by an order of the Court made in the suit of Cox, Trustee.

This Court holds that the suit by Cox, Trustee, was brought in the wrong forum.

This being true, it would indeed be a strange doctrine if, by the appointment of a Receiver in a void cause, the void cause became a vitalized and valid cause, and the Court acquired jurisdiction and could then proceed to adjudicate the rights of the parties.

This is to say: *the Court appointed a Receiver because it had jurisdiction, and had jurisdiction because it appointed a Receiver.*

While it does not directly say so, the second question leaves the impression that a receiver of the stock of goods was appointed in the Bankruptcy Proceedings. This is not true, as hereinbefore stated, and the record shows that a receiver was appointed in the plenary suit in equity, the very suit, which this Court says, the United States District Court cannot entertain.

The effort of appellee is to show that the property is part of the bankrupt's estate,—in possession of the Bankrupt Court,—and cannot be gotten out of its possession, as decided by this Court in White vs. Schloerb, 178 U. S. 542, and the Court can proceed to administer this estate. This position is based on a false premise.

The Bankrupt Court is not in possession of the property as part of the bankrupt's estate, neither the bankrupt himself, the receiver, trustee, or a receiver appointed in the bankruptcy proceedings, ever had the property in possession; but after the due appointment of a trustee in bankruptcy, this trustee sought to get the property from Wall & Huske who claimed it as their property under a sale by the bankrupt to them before any proceedings in bankruptcy was started, and this trustee brought his suit, and on this suit a receiver was appointed. Now, could the trustee bring this suit in the United States District Court? If he could not, the suit fails, and all done under it fails. If the Bankrupt Court had the property rightfully in its possession it could administer it; but can it wrongfully obtain it and keep its custody against the protest of a third party claiming it?

The entire case is this: Gilbert made a transfer of a stock of goods to Wall & Huske, after the transfer Gilbert was adjudicated a bankrupt, a trustee was appointed, creditors believed that the sale by Gilbert was a fraud, Wall & Huske contended it was no fraud, that the goods

belonged to them. Now, how can this alleged fraudulent transfer be set aside and the goods recovered by the trustee?

This is the plain question:

Can the property be taken by any summary process of the Bankrupt Court? No.

Can the property be recovered by the trustee in a suit in the United States District Court without the consent of the defendant? No.

Then this is asked: If the Trustee takes the porperty by a suit brought in direct violation of the law and the Court in this manner gets possession: why can it not, by some ancillary process, keep the property and administer it? Of course such proceeding is a clear subterfuge, an effort to evade the plain provision of the law as to the manner in which property claimed by a third party can be brought into the Bankrupt Court, under the provisions of the Bankrupt Act.

Judge Lowell, *In re Ward, Supra*, speaking of Bardes vs. Bank, says:

> The decision of the Supreme Court has so gravely modified the theory of jurisdiction in bankruptcy previously held by all these courts, that their practice prior to that decision affords little support for a continuance thereof. In the case above cited, the Supreme Court actually decided that a District Court has no jurisdiction, except by defendant's consent, of a suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party before the institution of bankruptcy proceedings.

And further,

> Counsel for the petitioners urged that the Supreme Court passed only upon the jurisdiction of this Court over plenary suits and that the jurisdiction by summary process was left undisturbed. It would be strange, however, if a Court be without jurisdiction to determine the title or to affect the control of property by a plenary suit, where all parties must be fully heard, and yet has jurisdiction on summary process, and without hearing, to take possession of the same property or to restrain its use. I do not understand that the Supreme Court has held that the District Court may do by summary process that which it is forbidden to do in a plenary suit. The case of White vs. Schloerb, 178 U. S. 542, 20 Supreme Court 1007, 44 L. Ed. 1183, held only that, after property had once passed into the custody of a Court of Bankruptcy by the Referee's taking possession of it, it was not open to seizure by a State Court on writ of replevin, and, if so seized, could be retaken by the Court of Bankruptcy by summary process. The case has no application to property which has never been in the possession of a Court of Bankruptcy.

The Bankrupt Act, Section 23, Sub-Sec. b, points out the way in which a trustee can bring a suit to recover property in the possession of a third party claiming it, and this Court, in Bardes vs. Hawardin Bank *Supra*, denies jurisdiction of such suits to the United States District Court, and expressly gives it, in such instances as the case

at bar, to the Courts of the State in which the parties reside.

Should this Court think that the second question is in any way raised by the record, and is a matter for its consideration, we respectfully suggest that the answer to the first question is *a fortiori* an answer to the second question.

To say that the United States District Court cannot entertain a suit by a trustee to recover property in the hands of a third party claiming it adverse to the bankrupt, answers the second inquiry, asking if the United States District Court cannot do the same thing by some summary or ancillary proceeding.

In a plenary suit by the trustee, all parties are before the Court in the regular way, and can make such proper defense as they are entitled; certainly if the United States District Court has no jurisdiction of such suit except by defendant's consent, it cannot, by any ancillary, *ex parte*, or summary mode of procedure take jurisdiction and decide on the same matter between the same parties, without their consent.

This would be to accomplish by indirection that which could not be accomplished by a direct proceeding, and would render of no avail the express limitation to the jurisdiction of the United States District Court, provided by the Section of the Bankrupt Act aforesaid.

REPLY TO BRIEF OF APPELLEE.

Under an agreement of counsel in this cause, a copy of which is attached to this brief as an appendix, the counsel of appellant has a right to reply to the brief of appellee, and now respectfully submits the following:

STATEMENT OF FACTS.

The appellee under the above heading, sets forth largely

the contents of the Bill of Complaint filed, and states at length the facts which he desires to prove in sustaining the prayer in his bill. Such allegation of facts cannot be material or pertinent to the question as to whether the United States District Court has jurisdiction over the controversy. Appellee further says:

> "On November 6th, 1899, a Receiver was appointed in the Bankruptcy Proceedings by Judge Ewart, and an injunction was issued against the said Wall & Huske, enjoining them from interfering with the property until the election and qualification of the trustee of W. H. Gilbert, and the trustee was ordered to bring suit in the United States Court or the Courts of the State to determine the matters in controversy.
>
> ("The order appointing the Receiver does not appear in the Record, but the fact that a Receiver was appointed and took possession of the property appears fully from the finding of the fact by Judge Waddill, in rendering the opinion of the Circuit Court of Appeals in this cause, as will appear by an inspection of same at Page 410, Vol. 101, Federal Reporter, and as appears as a fact found in the questions certified.")

The above is an extraordinary statement. We do not know who prepared the brief of Appellee on this point, but we hardly think it could have been the counsel who has been appearing in this cause from the beginning, as the statement herein, that a Receiver was appointed in

the Bankruptcy proceedings on November 6th, 1899, is wholly untrue. And, it is wholly untrue that at *any time* in the Bankruptcy Proceedings a Receiver was appointed of the stock of goods claimed by the defendants, Wall & Huske, and sought to be recovered in this controversy: and it is wholly untrue that such receiver, (meaning a receiver appointed in the Bankruptcy Proceedings,) took possession of the property aforesaid. On the other hand, no Receiver was ever appointed of the stock of goods, except the receiver appointed by the Court in the suit of Cox, Trustee v. Wall & Huske; which receiver was appointed by motion in said cause by his Honor, Judge Ewart, by order dated January 15th, 1900. The record discloses this to be true, and no where in the record can be found anything to contradict this statement. As a matter of fact, there was no appointment of any such receiver as contended by Appellee, and should this Court see fit to stray out of the record and send for all of the orders, decrees and papers of every kind made in this suit, or in the Bankruptcy Proceedings, no such order could be found in the Bankruptcy Proceedings appointing a Receiver of the stock of goods in the possession of Wall & Huske, for the simple reason that none was ever made We again respectfully call the attention of the Court to the Record.

Appellee says in his brief, that a Receiver appointed in Bankruptcy Proceedings took in his possession the property and intimates that the property was in the possession of such Receiver at the time of the institution of this suit, and that the property was in the hands of the Bankrupt Court, meaning that it had possession of the RES, and having possession of the res, had jurisdiction to entertain this suit. This is not true. The record says, " the defendants, Wall & Huske, at the time of filing the subpœna and Bill of Complaint and Supplemental Bill of Complaint,

were in possession of the stock of goods, holding same under a Bill of Sale from W. H. Gilbert." Here it will be seen that the brief of Appellee is squarely contradicted by the Record. The authority to which Appellee refers, upon which he bases the statement that a Receiver was appointed in the bankruptcy proceedings and took possession of the property, is an expression in the opinion of the Circuit Court of Appeals rendered by Judge Waddill in this cause, overruling the demurrer of defendants, and is also to be found in the framing of the second question certified to this Court. We will refer to these matters later.

Appellee further says, the defendants filed an answer and also a pleading which they called a Plea and Demurrer. No answer was filed, as reference to the record will show, but there was filed a pleading called a Plea and Demurrer, which raises the question of jurisdiction, and expressly states "THAT THE DEFENDANTS DO NOT CONSENT TO THE JURISDICTION OF THIS COURT."

At the hearing before the Court in the plenary suit on motion for a Receiver and injunction, his Honor, Judge Ewart, made the following order:

> "In the above entitled cause the plea to the jurisdiction of the Court, filed by respondents, is overruled. On the reading and consideration of the bill of the plaintiff and answer of respondents, it is ordered, adjudged and decreed that the injunction issued by this Court December 16th, 1899, be continued until the final hearing of this cause, and the respondents are hereby enjoined and restrained from interfering in any manner with the stock of goods described in the bill of the plaintiff, the same being the identical

stock of goods alleged to have been purchased by the respondents of W. H. Gilbert, Bankrupt.

Samuel F. Vance, of the city of Winston, N. C., is hereby designated and appointed as temporary Receiver to take into his possession the said stock of goods described in the bill of complaint."

The above order clearly shows that the questions raised by defendants, on the motion to appoint a receiver and for injunctive relief, were, first, the question of jurisdiction of the United States District Court, wherein defendants, Wall & Huske, attempted to show that the Court had no jurisdiction under the Bankrupt Act to entertain the suit "Without the consent of the proposed defendants," and that the proposed defendants expressly witheld their assent to the jurisdiction; and, secondly, if the Court should hold it had jurisdiction to entertain the suit, and could in the suit consider a motion to appoint a receiver and grant an injunction, defendants filed affidavits and exhibits showing why the receiver should not be appointed. The Court in the order above set forth inadvertently uses the word "answer," but no answer was filed as the record shows.

REPLY TO ARGUMENT OF APPELLEE.

It seems from the brief of appellee that he admits the argument of defendants, and admits that under the doctrine of Bardes vs. Bank, the District Court of the United States has no jurisdiction to entertain a plenary suit against the defendants in this case, but alleges further three reasons why the case at bar is not controlled by the doctrine of Bardes vs. Bank, and that the District Court

has obtained jurisdiction by reason of the conduct of defendants, which three reasons are as follows:

First—That the question of jurisdiction cannot be raised by demurrer, but can only be raised by plea in abatement.

Second—That defendants have, by the form of their plea, and by appearing, consented to the jurisdiction of the United States District Court to entertain a plenary suit against them.

Third—That the Bankrupt Court being rightfully in possession of the *res*, can administer it, and can entertain this suit by the Trustee against Walle & Huske to try the title to the property.

We will take up the questions in the order named.

First—That the question of jurisdiction cannot be raised by demurrer, but can only be raised by plea in abatement.

To support this doctorine, appellee says that the practice of the United States Courts will conform as nearly as possible to the practice of the State Courts, and cites some authorities from the Supreme Court of North Carolina in support of his contention, and that a plea in abatement is the proper course under the practice in North Carolina. The authorities he cites are not in point. The question raised in each of the cases cited is not one of jurisdiction of the subject matter, or of the person, but is simply a question of *venue*—whether a cause could be removed from one county to another. This law of *venue* must be taken advantage of by a plea in abatement under the laws of North Carolina, because if plaintiff is permitted to try his case, lose it, and then take advantage of the wrong venue, he could have two trials in different places of the same cause.

We think the distinction is clear between a plea to the jurisdiction of the subject matter or person and a plea to the venue. If the practice of the United States Courts should conform to the State Courts in this respect, it is clear that the defendants in their plea to the jurisdiction by way of demurrer, is correct. Such is the doctrine in North Carolina.

The Code of North Carolina expressly says:

> "The defendants may demur to the complaint when it shall appear upon the face thereof, either:
>
> "(1) That the Court has no jurisdiction of the person of the defendants or of the subject matter of the action."
>
> The Code, section 239.

The uniform decisions of the Court are in harmony with this provision of the Code. In the cases cited by appellee from the Supreme Court of the United States all are upon the same line, and are merely questions of venue. In the case of DeSobry vs. Nicholson, 3rd Wallace, 423, the Court says: "In equity the defense must be presented by plea or demurrer, and not by answer." This is an equity case.

Second—"That defendants have by the form of their plea, and by appearing, consented to the jurisdiction of the United States District Court to entertain a plenary suit against them."

The following, which we take from the record, shows to the Court the circumstances under which defendants have appeared in this cause:

The trustee in bankruptcy, having been selected by the creditors, elected to bring suit, and did bring suit, in the United States District Court to recover the goods then in the possession of defendants, and in that suit moved for the appointment of a receiver of the property and for an injunction. The defendants appeared in obedience to the notice of this Court and defended as follows:

1st: Denied the jurisdiction of the Court to entertain such suit; and

2nd: Filed affidavits tending to show that no receiver should be appointed.

It will be noted that the time for filing pleadings on the part of defendants had not come in the ordinary course of the Court; they appeared to defend their rights in an ancillary motion in the original cause, and denied the jurisdiction of the Court to entertain the cause.

The complainant used his supplemental bill as an affidavit in support of his motion aforesaid. The defendants, in addition to the affidavits filed in their behalf as aforesaid, filed the pleadings set out in the record entitled "Plea and Demurrer," raising the question of jurisdiction, and in the plea stated that the defendants did not consent to the jurisdiction of the Court. This pleading may have been inartificially drawn, but it will be remembered that the act of Congress had been only recently passed, the practice new, and such decision as had been rendered on the provisions of the act conflicting and inharmonious. The motion "was heard before His Honor, Judge Ewart, on demurrer of defendants to the jurisdiction of the United States District Court; and the cause was heard before the United States Circuit Court of Appeals on demurrer to the jurisdiction of the United States District Court, without objection from complainant as to form of

plea, except complainant did make this objection on the argument made on the re-hearing." (The record, page 17.)

It will be seen from the judgment of the District Court, that the question of jurisdiction was raised in that Court without objection to form of plea; it will be seen from the judgment and opinion of the Circuit Court of Appeals, that in considering the matter before that Court, no question was raised as to form of plea; and that only on the re-hearing of the case, after the opinion of Bardes vs. Bank had been published, do we hear from complainant any such objection as they now attempt to present to this Court, and even at that time nothing of any kind was said to show or to inform the Court or the parties the nature of such objection. It would seem that if any rights have been waived, complainant has waived any rights he may have had to the form of defendant's plea.

A parallel of the supplemental bill and defendant's plea is made for the purpose of showing that the plea was really an answer. It will be seen by reading defendant's plea and the allegations and admissions therein, it was solely a plea to raise the question of jurisdiction; the plea frankly admits the facts of nearly every paragraph of the supplemental bill, in order that the matter might come squarely before the Court on the question—whether the United States District Court had jurisdiction to entertain the suit, when the defendants expressly refused its assent to such jurisdiction.

No answer was filed to the original bill, which was full and extensive, containing much matter and a "number of interrogatories required to be answered by J. D. Wall and T. W. Huske respectively;" all of which interrogatories are omitted from the record as unnecessary to the decision of the question presented. (Record, page 10.) The conduct of the defendants was, therefore, in obedience

to the notice to show cause why a receiver should not be appointed of their property—to come before the Court and expressly withhold their consent to the jurisdiction, and on this express denial of consent to plead to the jurisdiction of the Court. Under Bardes vs. Bank, *unless the consent of the defendants was obtained, the Court should have instantly dismissed both the cause and the motion.* But this the Court declined to do and proceeded to take up the question of appointing a receiver of the defendants' property. This motion these defendants contested by filing affidavits showing the complainant under no circumstances was entitled to have the property of these defendants taken from them.

In Bardes vs. the Bank, this Court says:

> "The District Court of the United States can, by the proposed defendants consent, but not otherwise, entertain jurisdiction over suits brought by Trustees in Bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institutions of proceedings in bankruptcy."

It is clear from the provision of the Bankrupt Act, Section 23, Sub sections a and b, and the enunciation of this Court, that the jurisdiction of the United States District Court can only be obtained by defendants consent; this Court has no jurisdiction to entertain such a suit unless the defendants consent to be sued in such Court. In this case defendants in their first appearance before the District Court, which was on a motion for a Receiver, expressly refused this consent; and contended that the Court had no jurisdiction. Thus far certainly the

District Court had no jurisdiction, and should have dismissed the case. Indeed, from a fair construction of the act, unless the consent of defendants appeared affirmatively, the Court had no jurisdiction. Yet it is contended by Appellee that the pleading entitled "Plea and demurrer" filed by defendants in this motion is a plea to the merits of the case and a consent to the jurisciction of the United States District Court.

This position is not tenable,

First. The act is one of general jurisdiction and defendants consent is necessary to permit the United States District Court to entertain a Plenary Suit against them, and this consent must be voluntary.

Second. A consideration of the pleadings show the purpose and effect of defendants plea is to deny jurisdiction to the District Court and prevent the appointment of a receiver. It admits all the allegations of the Supplemental Bill looking to bringing the question of jurisdiction fairly and directly before the Court; it expressly states that defendants appeared for the purpose of dismissing the bill, and for no other purpose; and it expressly states that "defendants do not consent to the jurisdiction of the Court."

Notwithstanding this effort on the part of defendants to protect their rights under the express provision of the act of Congress, and their express refusal to give consent to this attempt on the part of complainant to sue them in the United States District Court, Appellee contends that by such technical appearance, defendants consented to such jurisdiction, although in the paper writing which Appellee contends gives consent to the jurisdiction, it expressly stated that defendants do not consent to the jurisdiction.

Under no fair construction could the Bankrupt Act be given such effect. Appellee cited what it calls analogous

acts and many decisions attempting to show that the rights of defendents under the Bankrupt Act is a personal exemption liable to be waived by any technical appearance. We think that Appellee misconstrues the provision of the Bankrupt Act and its purpose. The essential difference between the Act of 1845 and 1867, and the Act of 1898 in their respective provisions giving jurisdiction to the United States District Court, and the clear purpose of this difference, shows that the consent of the defendant which is required under the Act of 1898 to give jurisdiction to the United States District Court, is more than a personal exemption. It is a right which defendants have to try the title of their property in the ordinary Courts of the land in which they are accustomed to be sued, unless they should in their volition consent to be sued in the Bankrupt Court. If this is the proper view of the act of Congress the right in question rises to something higher than a mere personal exemption, and in construing the powers of the United States District Court, it goes to the jurisdiction of that Court over the subject matter and the person, in this newly acquired power to entertain plenary action at law and suits in equity.

Appellee conceives that this jurisdiction of the United States District Court is the same, and governed by the same practice as the rights of parties under the acts of Congress regulating places where persons can be sued, and refers in his brief to the Act of 1887 amended by Act of 1888, giving jurisdiction to the several U. S. Circuit Courts, and also refers to the Act of 1875 regulating the jurisdiction in which National Banks can be sued, and sets out in his brief certain provisions of said Act. From an examination of these various acts of Congress, themselves, it is seen: that, while they are acts of general jurisdiction, the parts thereof set out by Appellee

in his brief and construed in the numerous decisions which he cites are provisions regulating the place where parties may be sued. They are simply provisions relating to *venue*.

The broad distinction is made by the Court between acts giving *general jurisdiction*, and those provisions defining the *place* where parties may be sued in Courts having general jurisdiction.

In the case of St. Louis vs. McBride, 141 U. S., 127, so strongly relied upon by Appellee, the facts are as follows: An action for damages was brought at law by a citizen of Arkansas against the defendant Railroad in the United States Circuit Court, but in the wrong district. Defendant answered and demurred, and the question presented to the Court was: did the appearance of defendant waive its right to have the suit in a different district? There the Court had complete jurisdiction of the subject matter and person with or without defendants consent, and it was simply a question of place,—of the particular district,—in which he had a right to have the case tried. The Court held that the general appearance waived the exemption as to the place of trial. The Court further said: "Its demurrer, as appears, was based on three grounds, the two referring to the jurisdiction, and the third, that the complainant did not state facts sufficiet to constitute a cause of action. It was, therefore, in the first instance, a general appearance to the merits." It is clear that the third cause of demurrer was a plea to the merits, wherein defendants attempted to obtain a judgment in its favor on the facts set forth in the complaint, and if the defendants had obtained such judgment it would have been conclusive on all parties. In the case at bar there was no such appearance or effort by defendants, but after denying jurisdiction defendants did by affidavits of alleged facts,

attempt to prevent the appointment of a Receiver of their property. It will be noted that the two causes of demurrer by defendants in this case is in no way similar to the cause of demurrer in McBride's case, which the Court held to be a plea to the merits. The demurrer in this case in no way affected the merits of the plaintiff's suit, but it was exclusively confined to the jurisdiction of the Court to entertain this suit of the complainant.

In the North Carolina Courts, pleas to the venue must be by plea in abatement, and in such instances, the practice is not to dismiss plaintiff's case, if in the wrong venue, but to remove the cause to the proper venue. This is done for the reason that the Court has general jurisdiction over the subject matter and person. Such, certainly, could not be the practice under the Bankrupt Act, Section 23 b. This distinction which we present to the Court is clearly defined in McBride's Case, *Supra.*

The Court in this case, quoting from Chief Justice Waite in the case *ex parte* Schollenberger, 96 U. S., 369, says:

> "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of the defendants, and one which he may waive."

Under the Act of Congress in regard to National Banks—the Act of February 18th, 1875,—National Banks should be sued only in the counties in which the Bank is established. In the construction of this Act, appellee cites Bank vs. Charlotte, 132 U. S., page 141.

In this case the Bank was sued in the wrong county.

but appeared in the Court, pleaded to the merits, tried the case, lost it, appealed to the Supreme Court of the State, and for the first time attempted to raise the question of *venue* in the latter Court. This Court held that this provision was only a personal privilege, and waived by the conduct of defendant Bank. The question thus raised is purely one of venue and had it been properly made in the Courts of North Carolina the cause would have been moved to the proper county. These two Acts thus cited by appellee it seems to us refer to an entirely different question. In each of the Acts the Court had general jurisdiction over the subject matter of the suit and the cause, with or without the consent of any one, and the only thing forbidden, was the jurisdiction of the person in that particular place, and this objection, of course, might be taken as waived by any slight acts. But, under the Act of 1898, the Bankrupt Court is forbidden to exercise jurisdiction, not only over the person of the defendants, but over the cause, except by consent of defendants. This makes a case where a waiver will not be presumed on technical grounds, especially where defendant expressly refuses to consent to the jurisdiction.

In re Ward, Fed. Rep. 104, page 985, the Court says:

> "He appeared by counsel, and, while not absolutely denying the jurisdiction of this Court, * * * * * * yet refrained from consenting to the jurisdiction."

The Court held in that case it had no jurisdiction of the cause.

In re Nugent, Fed. Rep. 105, page 581, the Circuit Court of Appeals, of the Sixth Circuit, of its own motion, dismissed the cause for want of jurisdiction of the District

Court, and because it did not appear that defendant had consented to the jurisdiction. In the case the defendants filed affidavits alleging that he did not have the property alleged to belong to the bankrupt and various other orders were made in the cause, one sending him to jail for failure to deliver up a fund alleged to be in his hands belonging to the estate of the bankrupt, and to which defendant had replied by affidavit; and, on reviewing these orders, the Circuit Court of Appeals considered the whole proceeding as necessary to a proper determination of the appeal, and said:

> "Neither was the respondent subject to process from that (District) Court. The respondent, the bankrupt and the Trustee were all citizens of Kentucky. If the bankrupt could not have instituted proceedings in the District Court for the recovery of the money, it seems clear that the Trustee could not."

The broad distinction in the construction of the Acts of Congress of *general jurisdiction*, and those concerning the *place* where causes are to be tried, is settled by the early opinion of this Court, as appears from the following:

> "An objection to jurisdiction on the ground of exemption from the process of the Court in which the suit is brought, is waived by an appearance and pleading to issue. (Toland v. Sprague, 12 Peters, 300,) but when the objection goes to the power of the Court over the parties or the subject matter

* * * appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer or at the trial."

Rhode Island v. Massachusetts, 12 Peters, 720, Law Ed. 1258.

The Court in a later case says:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the Court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the Court over such a case between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election: and the defendant's right to object that an action within the general jurisdiction of the Court is brought in the wrong district is waived * by entering a general appearance, without taking the objection."

It is clear from the record in this case that the defendants on first appearance, raised the question of jurisdiction,

and that question being decided against them, they attempted by affidavits and exhibits to prevent the appointment of a Receiver. This, appellee contends, is a waiver of their objection made, and brings them in the Court for all purposes. On this subject defendants refer to the following decisions:

> Neither a special appearance for the purpose of objecting to the jurisdiction, and in answer to the merits after that objection has been overruled, is a waiver of the objection. Such objection is considered abandoned only when the parties plead to the merits in the first instance without insisting upon the objection.

Southern Pacific Co. v. Denton, 146 U. S., 202.
Harkness v. Hide, 98 U. S., 476.
In re Railroad Co., 164 U. S., 633.

> But the Court having ruled that it had jurisdiccion, the defendant is not bound to desert the case and leave the opposite party to take judgment by default. He is at liberty, after taking his objection, to make every defense cognizable by the Court, without forfeiting or impairing in the slightest degree his right to a trial in the proper Court.

Nat. Steamship Co. v. Tugman, 106 U. S., 118.
In re Curtis, 91 Rep., 741.
Arroyo Ditch Co. v. Superior Court, 27 Am. St. Rep., 94.

It seems to us that the true doctrine is, that when the defendants filed their plea, expressly refusing to consent to the jurisdiction of the United States District Court, the right to have their case tried in the State Courts became fixed, and anything done by them afterwards fails to deprive them of their right.

Under the provisions of the Act of March 3rd, 1891, Section 5, an appeal should be taken directly to the Supreme Court of the United States upon the question of jurisdiction purely.

But by an amendment to the act of 1891 by the act of 1895, where injunctive relief is asked, an appeal lies at once from the District Court to the Circuit Court of Appeals. But in all other cases, as was decided by this Court, an appeal could not lie from the District Court to the Supreme Court of the United States under the provisions above quoted except from a final judgment in the cause. The objection must be taken, and if overruled, case proceed.

McLish vs. Roff, 141 U. S., page 662.

This case seems conclusive of the question that where the defendants made their objection to the jurisdiction, their subsequent defense does not deprive them of their right to have their cause tried in the proper Court.

Appellee further contends that this cause does not come under the decision of Bardes vs. Bank, and urges the following:

Third—That the Bankrupt Court, being rightfully in possession of the *res*, can administer it, and can entertain this suit by the trustees against Wall & Huske to try the title to the property.

There is this difference between Bardes' case and the case at bar, to-wit: An injunction was issued by order of the Court out of the bankruptcy proceedings, restraining Wall & Huske from disposing of the stock of goods until the rights of creditors of the goods aforesaid could be tried in the proper Court, defendants remaining in possession of their property; and such was the condition when Cox brought his suit. We do not think this restraining order of the court gave it the possession of the *res*; if so, there was no need to bring the suit to get possession of the *res*.

Appellee fully understood this; but, in appellee's view of the case, in order to sustain the jurisdiction of the United States District Court to administer this property, it was necessary that the Court should be in actual possession of the *res*, and, of course, rightfully so. Thus we find an expression used by Judge Waddill in the decision of this case, heretofore referred to, construed to mean that a receiver had been appointed in the bankruptcy proceedings, and the second question certified to this Court construed to mean that a receiver was appointed in the bankruptcy proceedings, (to which error attention was called in defendants' brief.) By reason of this misconstruction, appellee boldly asserts as a fact that a receiver had been appointed in the bankruptcy proceedings, knowing that this statement was untrue; and to make this false statement appear plausible to the Court, appellee fixed the date of the alleged order appointing the receiver as November 6th, 1899; and further stated that under this order the receiver so appointed took possession of the stock of goods. Such a statement is untrue in fact, not sustained by the record, and not to be honestly drawn from the opinion of the Circuit Court of Appeals. Such sinister argument, I trust, will have no weight with this Court.

The Circuit Court of Appeals in the case at bar held that the trustee has power to bring a plenary suit to recover property in the possession of a third person, and discusses the provisions of the Bankrupt Act in regard to jurisdiction, and concludes that unless authority is given the Bankrupt Court to bring such suits, its power and usefulness is at an end. The opinion says:

> "The title to the property alleged to have been fraudulently conveyed, by the express terms of the act, as of the date of adjudication, vests in the bankrupt's trustee upon the assumption of the transfer being void, and the Bankrupt Court has, as authorized by the act, appointed a receiver to seize and take charge of the property involved, and now, in fact, holds the same."

It is seen that just what the Court below says "cannot be the law," this Court in Bardes' case says, is the law. Clearly the judge writing the above opinion does not say that the property vests in the Bankrupt Court, by the appointment of a receiver in bankruptcy proceedings, for he expressly alleges that the "title to the property by the express terms of the act * * * * vests in the Bankrupt's trustee upon the assumption of the transfer being void." The Court thus holding that the Bankrupt Act vests the property in the trustees, if the transfer by the bankrupt theretofore made, had been in fraud of creditors. The judge further says:

> "The Bankrupt Court has, as authorized by the act, appointed a receiver to seize and take charge of the property involved, and now, in fact, holds the same."

This is the clause appellee relies upon. Nowhere does it say a receiver was appointed in bankruptcy proceedings. The judge does say a receiver was appointed by the "Bankrupt Court." This is true. A receiver was appointed by the Bankrupt Court,—by the United States District Court sitting as a Court of Bankruptcy—in the cause of Cox, Trustee, vs. Wall & Huske, and took possession of the property and now holds the same. Now, would it not have been fairer to the learned judge who wrote the opinion, to suppose he was alluding to the receiver who was actually appointed as appears by the record, than to read into his opinion a statement of facts untrue in itself, and not in the record?

Throughout the opinion the judge calls the United States District Court sitting as a Court of Bankruptcy, the "Bankrupt Court," and then using this term, he says, "the Bankrupt Court appointed a Receiver." This expression enabled Appellee's counsel to write out in their brief as a fact the following: that on November 6, 1899, a receiver was appointed in the bankruptcy proceedings who took charge of the property and so had possession of the *res* at the time this suit was instituted. Not one word of which is true. Now, that the omission from the record of this alleged order appointing a receiver, may be accounted for, appellee says:

> "To show the absurdity of counsel's position, we will state that the order adjudicating Gilbert a Bankrupt and the order appointing Walter O. Cox, Trustee, and his qualification as such Trustee: the bond of Walter O. Cox, Trustee, for the maintenance of this suit as required by the acts of Congress and the orders of the District Court: none of these appear of record." * *

Appellee forgets that, while it is true that copies of orders are omitted from the record, the record expressly states the existence of all orders that were made, and of all facts necessary to present the question to the Court, and the text of such orders in full is only omitted from the record to prevent encumbering it If there had been an order in the bankruptcy proceedings appointing a receiver it would certainly have appeared in the record.

Appellee further says: The appointment in bankruptcy proceedings of a receiver on the 6th of November, 1899, "appears now as a fact found by the Circuit Court of Appeals in this second question."

The second question reads:

> SECOND. "Said district Courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings, or in ancillary proceedings instituted either by the original petitioners, the receiver of the Court, the bankrupt's trustee, or of the Courts own motion, jurisdiction to bring in the alleged fraudulent transferee of the property, thus in the Court's possession, and do full and complete justice in one litigation."

The statement says that the District Court appointed a receiver. This is true as the record shows. It does not say that the appointment was in the bankruptcy proceedings as appellee contends. The questions are thus asked: had the Court in "said proceedings or in ancillary

proceedings instituted by the creditors, trustee, receiver, or by the Court's own motion, jurisdiction to bring into the Bankrupt Court an alleged fraudulent transferee?"

As heretofore contended in this brief, the series of inquiries suggested by the second question are not raised by the record, and if either of these questions pre-supposes that in the case at bar a receiver had been appointed in the bankruptcy proceedings, and by this means had the property in possession of the Bankrupt Court by a rightful process, neither the facts in the case, or the entire record of the bankruptcy proceedings, or the record now before this Court on which the questions are based, sustains it.

But, appellee contends that this second question finds a fact to exist, to-wit: that in this case a receiver was appointed of the property in the bankruptcy proceedings and took charge thereof: and that defendants are bound by the question and bound by the facts which the question contains. In reply, we respectfully suggest to the Court:

First, that the question does not find said facts to exist. Second, that a question certified for direction of this Court does not itself find facts and put them in the record, but is a question raised by facts of record. That the record is the basis of all questions, and that this Court looks to the record, and will consider only such questions as the facts of record make pertinent, and defendants are bound only by the record.

Appellee says:

> "After the election and qualification of a trustee, stock remained locked up by agreement of counsel and in the possession of the Court."

Neither true in fact, nor found in the record.

There are many more statements in appellee's brief which are not in harmony with the record in this case, to which it is unnecessary further to call the attention of the Court.

In conclusion, I would beg leave to say that the record sent to this Court presents the real question for consideration, to wit: has the United States District Court jurisdiction to entertain the plenary suit by Cox, trustee, against Wall & Huske, the purpose of which is to declare void the bill of sale from Gilbert to defendants, Wall & Huske, and to recover from them the property conveyed by said bill of sale, without the consent of the proposed defendants?

CLEMENT MANLY,

Counsel of Appellants, Wall & Huske.

APPENDIX.

SUPREME COURT OF THE UNITED STATES,
October Term, 1900.

(504.)

John D. Wall and Thomas W. Huske, trading as Wall & Huske, Appellants,

vs.

Walter O. Cox, Trustee of W. H. Gilbert, trading as Winston Hardware Company and as Gilbert Hardware Company.

AGREEMENT OF COUNSEL.

Whereas, the said cause has been advanced by the Supreme Court of the United States to be heard upon brief, it is agreed by counsel that the briefs shall be submitted as follows:

Appellants shall have fifteen days within which to prepare and submit to appellees their brief, and appellees shall have fifteen days thereafter within which to submit to appellants the brief of appellees, and that appellants shall have fifteen days thereafter within which to submit to appellees their full brief.

The briefs so prepared and exchanged shall be filed in the Supreme Court of the United States by the 10th day of April, 1901.

This February 15th, 1901.

CLEMENT MANLY,
Attorney for Appellants.

LOUIS M. SWINK,
JONES & PATTERSON,
Attorneys for Appellee.

No. 504.

Office Supreme Court, U.S.
FILED
APR 11 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Swink for Appellee.

SUPREME COURT OF THE UNITED STATES.

Filed April 11, 1901.

NO. 504 OCTOBER TERM, 1900.

JOHN D. WALL and THOMAS W. HUSKE, trading as WALL & HUSKE, APPELLANTS,

vs.

WALTER. O. COX, Trustee of W. H. GILBERT, Trading as WINSTON HARDWARE COMPANY and as GILBERT HARDWARE COMPANY, APPELLEE.

On a certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

ARGUMENT FOR APPELLEE.

LOUIS M. SWINK,
LINDSAY PATTERSON,
Counsel for Appellee.

Supreme Court of the United States.

NO. 504, OCTOBER TERM, 1900.

JOHN D. WALL AND THOMAS W. HUSKE, TRADING AS WALL & HUSKE, APPELLANTS.

vs.

WALTER O. COX, Trustee of W. H. GILBERT, Trading as WINSTON HARDWARE CO, And as GILBERT HARDWARE COMPANY, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Statement of the Case on Behalf of Appellee.

The appellee, Walter O. Cox, trustee, does not agree with the statement of facts of the case as appears in the brief of the appellants, and respectfully submits the following:

> "W. H. Gilbert was a retail hardware dealer in the city of Winston, N. C., carrying a stock of $16,000.00 or $18,000.00. Becoming embarrassed in June 1899, he secured an extension from his creditors, executing notes in large amounts maturing December 1899 and January 1900. Immediately after securing this extension, he

bought largely of hardware dealers, increasing his stock to an abnormal extent, at the same time selling stock in hand at cut prices, at and below cost.

In September 1899, Gilbert repeatedly attempted to dispose of his stock, both at Martinsville, Va. and Winston, N. C., offering same considerably below alleged cost."

(The above is statement of facts by Judge EWART, found in 99 Fed. Rep. 546.

On the night of October 10th 1899, he agreed to sell his entire stock in the city of Winston, N. C. to Wall & Huske and on the next morning he executed a deed or bill of sale for same. The value of this stock was $16,000.00 to $18,000.00 and the consideration expressed in the bill of sale was $8,000.00, but it is alleged that not more than half that amount was actually paid by the appellants.

Immediately after receiving whatever moneys paid to him, on October 11th 1899, Gilbert left the state of North Carolina, without paying his creditors anything. His total indebtedness, at the time this bill of sale was executed, was about $19,000.00.

After Gilbert left on October 11th 1899, the appellants Wall & Huske, attempted to take charge of the stock of goods alleged to have been purchased by them. On the morning of October 12th 1899, certain creditors, filed in the District Court of the United Stated for the Western District of North Carolina, an involuntary petition in Bankruptcy, praying that the said W. H. Gilbert might be adjudged a bankrupt. The act of Bankruptcy, alleged to have been committed by Gilbert, was this fraudulent sale or transfer to the appellants, Wall & Huske.

On presenting this petition in bankruptcy, the creditors presented another petition before the District Court setting up the fact of the alleged fraudulent sale and charging the appellants with aiding and abetting the said Gilbert to defraud his creditors.

Upon this petition, His Honor Judge EWART issued a restraining order, restraining the appellants from disposing of or in any manner interfering with the stock of goods described in the bill of sale and also gave them notice to show cause upon a day therein named why they should not be perpetually enjoined.

On November 6th 1899, a Receiver was appointed in the Bankruptcy Proceedings by Judge EWART and an injunction was issued against the said Wall & Huske enjoining them from interfering with the property until the election and qualification of the trustee of W. H. Gilbert, and the trustee was ordered to bring suit in the United States Court or the Courts of the State to determine the matters in controversy.

The order appointing the Receiver does not appear in the record but the fact that a Receiver was appointed and took possession of the property appears fully from the findings of fact by Judge WADDILL, in rendering the opinion of the Circuit Court of Appeals in this cause as will appear by an inspection of same at page 410, Vol. 101 Fed. Reporter; and as appears as a fact found in the second question.

On October 27th 1899, the court duly adjudged W. H. Gilbert a bankrupt and on the 23rd day of November, Walter O. Cox, the appellee, was elected and qualified as trustee of the estate.

Subsequent to the qualification of Cox, trustee, the injunction of November 6th was continued by consent of counsel.

On the 6th day of December, 1899, Cox, trustee duly

filed his bill in equity and sued out a writ of subpoena in the district court.

On the 12th day of December 1899, Cox, trustee, filed his supplemental bill of complaint, alleging among other things, the sale, the institution of the suit in equity, attached a copy of the original bill to this supplemental bill, alleged that the stock of goods were deteriorating in value by reason of the orders of the court theretofore issued, that no inventory of the goods had ever been taken, the insolvency of Wall & Huske, and that the stock of goods had been purchased wholly on credit, that they were threatening to sell, dispose of or intermingle the stock of goods alleged to have been purchased with their own stock of goods, if they were allowed to have possession of the property, and the prayer of this supplemental bill was for the appointment of a Receiver to sell the goods and reduce same to money, and for an injunction until the matters in controversy could be heard. All of which appears fully by the copy of the supplemental bill on pages 11 and 12 of the record.

Upon the filing of this supplemental bill before His Honor Judge EWART, an order to show cause was duly issued returnable before the Judge on December 18th 1899, at Charlotte, N. C. This was continued, by consent, from day to day, and was heard before Judge EWART on January 9th 1900.

On January 6th 1900, the appellants, Wall & Huske, filed an answer to the supplemental bill in the proceedings, and also filed a pleading which they called a plea and demurrer, all of which appears on pages 13 and 14 of the certificate. They also, at the same, time filed affidavits in support of their answer, and plea and demurrer socalled, as appears by the record on page 16.

In these pleadings, they admitted the filing of the bill

in the district court by the complainant, admitted that the process had been duly served upon them, admitted that the stock of hardware was of value appeared in their answer to the original bill, that the property was deteriorating in value by reason of being locked up under the orders of the court, MADE AT THE INSTANCE OF THE CREDITORS.

They denied that no inventory had been taken of the stock of hardware,—that they had intermingled the stock of hardware with their own stock, except as appears by their answer and exhibits thereto attached, marked exhibits 1 and 2 and 3. They admitted that they were men of small means but averred that they were able to pay any damages which might be awarded against them; denied that they had pretended to purchase the stock from W. H. Gilbert, but averred that same was bought by them in good faith and that they had paid for it and denied that the trustee would suffer any loss or damage by allowing them to have possession of the property.

In their demurrer to the jurisdiction, they set up the following as appears by the record page 14:

> "Defendants, appearing specially under protest for the purpose of this plea, and for no other, say:
>
> "That the complainant, as trustee, if he has any right to the stock of goods described, has a plain, clear and adequate remedy at law to recover same from these defendants and is not entitled to invoke the aid of the equitable jurisdiction of this court to enforce the right; and this honorable court, sitting as a court of equity, has no jurisdiction to hear and determine the question as a court of equity.

"Defendants further say that the district court of the United States for the Western District of North Carolina has no jurisdiction to entertain this bill of complaint or to determine the question arising between the complainant as trustee in bankruptcy of W. H. Gilbert and these defendants.

"That these defendants hold and claim title to the said property described in complainants bill under a purchase from W. H. Gilbert prior to the institution of the proceedings in bankruptcy against W. H. Gilbert.

"That both W. H. Gilbert, the complainant trustee, and these defendants were, at the time of filing said bill of complaint, and now are citizens of the State of North Carolina and that the defendants do not consent to the jurisdiction of this court.

"Wherefore, these defendants pray for judgment of this honorable court whether they shall be compelled to make any further or other answer to the bill of complaint herein or to this motion for the appointment of a receiver and for the appointment of a receiver or for an injunction or for any of the matters and things therein contained, and pray that the motion of complainant for the appointment of a receiver and for this injunction be denied by this honorable court, and that they be hence dismissed with their reasonable cost in this behalf sustained.

"And further defendants pray that the original bill of complaint filed herein be dismissed by this honorable court and that these defendants recover their reasonable cost in this behalf sustained."

Here follows in the record the usual verification to a pleading as prescribed by the Code of North Carolina.

See Record pages 13, 14 and 15.

This cause was heard before his Honor Judge EWART on January 9th 1900, upon the pleadings as appear in the record, and also, upon affidavits of both sides in support of and against motion for Receiver.

See Record page 16.

On January 13th 1900, His Honor Judge EWART appointed a Receiver in the Equity suit, as appears by the order in the record on page 16.

This order is, in part, as follows:—

> "In the above entitled cause the plea to the jurisdiction to the court filed by the respondents is overruled. ON READING AND CONSIDERATION OF THE BILL THE PLAINTIFF AND ANSWER OF RESPONDENTS IS ORDERED, ETC."

On the 15th day of January 1900, His Honor filed an opinion in support of the order of the 13th. This opinion is found in Federal Reporter Vol. 99, at page 546 and is printed in full in the appendix of this brief.

Upon the rendering of this opinion, the appellants, Wall & Huske, filed a petition for Review in the Circuit Court of Appeals for the fourth Circuit and the cause was there heard, as upon appeal, in February 1900, before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge, and the opinion of the Court was delivered by his Honor Judge WADDILL on May 1st 1900, duly reported in Federal Reporter, Vol. 101, at page 403 and printed in full as an appendix to this brief.

A motion to rehear was filed before the Circuit Court of Appeals and the cause was heard at November Term 1900 of said Circuit Court of Appeals. The court then sends its certificate to this Court asking on the Record

its directions, and submits two questions:—

First:— Under the facts and pleadings above stated, had the District Court of the United States for the Western District of North Carolina, jurisdiction over the controversy?

Second:— Said District Courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a Receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings instituted either by the original petitioners, the receiver of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferree of the property, thus in the court's possession and do full and complete justice in one litigation?

ARGUMENT FOR APPELLEE.

The record states on page 17 that:—

> "The defendants Wall & Huske, desiring a review of the order overruling their demurrer, duly filed in the United States circuit court of appeals on the 22nd day of January, 1900, a petition asking the supervisory power of the court under the act of Congress of 1898, known as the bankrupt act."

The certificate also shows that the order made in the suit of Cox vs. Wall & Huske, was the appointment of a receiver to reduce the property to money and hold same during the pendency of the suit and until the end of the litigation.

While this interlocutory order, made in the conduct

of the suit at bar, is not strictly such an order as the Circuit Court of Appeals can take jurisdiction over, under Sec. 7 of the Act of March 3, 1891, (26 Stat. at L. 826) as amended February 18th, 1895 (28 Stat. at L. 666, Chap. 96) upon appeal, as this court has recently held in the case of Highland Avenue & Belt R. Co. vs. Columbian Equipment Co. 168 U. S. 627, we presume since the court is not required to pass upon the jurisdiction of the Circuit Court of Appeals in the question certified, that this court will consider the questions so certified and answer same. However under the authority of the above decision we do not think that the cause is properly in the Circuit Court of Appeals and we do not think the case of McLish vs. Roff 141 U. S. 662 is in any way in conflict with the case of Highland Avenue & Belt R. Co. vs. Columbia Equipment Co. supra.

First Question.

UNDER THE FACTS AND THE PLEADINGS ABOVE STATED, HAD THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA JURISDICTION OVER THE CONTROVERSY?

I.

Counsel for appellants says, "The record of the cause in this court clearly shows that the first question is," the identical question decided by this court in Bardes vs. Bank 178 U. S. 524. We think the questions sent up in this cause are a part of the record and a most essential part thereof. The counsel for appellants ASSUMES that this court will believe that the learned judges composing the Circuit Court of Appeals was not familiar with the opinion in Bardes vs. Bank, supra. It is not to be PRESUPPOSED that these learned judges, would in so short a time, after the opinion of this court was

handed down refer to it, the identical question just passed upon. When the certificate was being made up for this court, at the November Term of the Circuit Court of Appeals, counsel for appellants insisted strenuously that the question which appears in his argument, be the question certified. It seems certain that there was to his mind, at that time, a broad distinction between that question and the one certified.

The distinction appears fully by reference to the two cases. The decision of Bardes vs. Bank, supra, is of a general character, without reference to any particular facts, showing consent of the defendant or raising the equity jurisdiction of the court in possession of the RES. The question submitted in this record, raises fully the question of consent and also the equity jurisdiction of the court to entertain ancillary proceedings for the administration of an estate in the rightful possession of the bankrupt court. It also brings up the question, as to whether or not the appellants can object to the jurisdiction of the court by a demurrer, when the want of jurisdiction does not appear on the face of the bill, or whether they should take their objection in the usual method by motion to dismiss, plea in abatement, etc.

In North Carolina, the use of demurrers is expressly limited by Code Sec. 239.* All demurrers in North Carolina are special demurrers, as contradistinguished from a demurrer at law.

Love vs. Commissioners 64 N. C. 706.

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*Code Sec. 239.

"The defendant may demur to the complaint when it shall appear upon the face thereof, either:

(1) That the court has no jurisdiction of the person of the defendant, or the subject of the action; or

(2) That the plaintiff has no legal capacity to sue; or

(3) That there is another action pending between the same parties for the same cause; or

(4) That there is a defect of parties plaintiff or defendant; or

(5) That several causes of action have been improperly united; or

(6) That the complaint does not state facts sufficient to constitute a cause of action.

The Statue above noted, Sec. 230, provides that the demurrer shall only be taken FOR MATTERS APPEARING UPON THE FACE OF THE COMPLAINT. This has been the uniform practice in North Carolina and has the support of all of the decisions of the court.

The fact that the court does not have jurisdiction of the person, and this fact not appearing on the face of the complaint, it must be taken advantage of by a plea in abatement, otherwise the jurisdictional question is waived, and the court can render a valid judgment.

McLean vs. McDougal 54 N. C. 8 Jo. Law 483, 484.
Killan vs. Fulbright 25 N. C. 3 Ire. Law, 9, 10.
Branch vs. Houston (Bush. L.) 44 N. C. 85.
Bank vs. Brittan 66 N. C. 365.
McMinn vs. Hamilton 77 N. C. 300.
Cloman vs. Staton 78 N. C. 255.

RODMAN J. rendering the opinion of the court in Bank vs. Brittan 66 N. C. 365, supra, use sthis language, "A demurrer for want of jurisdiction can only be sustained, where the want of jurisdiction appears upon the face of the complaint."

The general rule on the subject is stated in Vol. I. Ency. of Pleading and Practice, at pages 3 and 4 and is, in part as follows:

> "The objection in abatement that a court has no jurisdiction must be taken by a plea in abatement, unless the lack of jurisdiction appears upon the face of the record, when it may be taken by demurrer.
>
> "These pleas while admitting jurisdiction in some court, deny it to the particular court in which the suit is brought for some reason alleged."

Irrespective of the State statue, it is the practice in the courts of the United States to take advantage of lack

of jurisdiction over the person by plea in abatement and not by demurrer.

Mr. Justice NELSON in Smith vs. Kernochern 7 How. 198, says: "Objection, when taken to the jurisdiction on the ground of citizenship, it must be taken by plea in abatement," citing

D'Wolf vs. Rabaud 1 Peters 477.
Evans vs. Gee 11. ib., 80.
Sims vs. Hundley 6 How. 1.
Jones vs. League 18 How. 76.
Shepherd vs. Graves 14 How. 505.
DeSobry vs. Nicholson 70 U. S. 3 Wall. 423.
Mexican Cent. R. Co. v Pinkney 149 U. S. 194, 218.

This question is one of practice and procedure in which the State Statue governs.

U. S. Rev. Stat. Sec. 914. (17 Stat. at L. 197.)
Carter vs. Bennett 56 U. S. 15 How. 457.
Jones vs. McMasters. 61 U. S. 20 How. 22.

Nothing appears on the face of the bill in the cause at bar which would, in the remotest degree, suggest that the court did not have jurisdiction. The fact that appellants had certain personal exemptions, should have been brought to the attention of the court, not by a demurrer, but by a plea in statement.

There is no distinction in principle between the place where an action may be brought and the court in which it may be prosecuted, if the court has jurisdiction of the subject matter. The cases cited, supra, are exactly in point; the personal privilege conferred upon the defendant in Sect. 23 b is analogous to his exemption as to venue. Courts cannot be clothed with jurisdiction by consent, but must derive their jurisdiction over the subject matter of the suit, from the lawmaking power.

It is further stated in the brief for appellants that on record page 17:—

> "It is agreed that the cause was heard before his honor Judge EWART on demurrer of defendants to the jurisdiction of the United States District Court, and that the cause was heard before the United States Circuit Court of Appeals on demurrer to the jurisdiction of the United States District Court."

But counsel in quoting from the record omits an essential part of the same as the record continues, without so much as a comma.

> "Without objection from complainant as to the form of the plea, EXCEPT COMPLAINANT DID MAKE THIS OBJECTION ON THE ARGUMENT MADE ON THE REHEARING."

As we shall show presently, the substance of what is called by counsel for the appellants, the plea and demurrer, is that of an answer in fact and that same shows conclusively that the defendants consented to the jurisdiction of the court when they filed the same. It makes no difference to this court when objection to the form of the plea and demurrer was first made. It was duly made in the court below, with the consent of that court, as is clearly evidenced by their questions certified to this court. We also note in what is called the "Reply of Appellants" to this brief an argument to the effect that counsel not raising this point in the first hearing of the cause, the appellee had waived his right to object and that even if the appellants had made a general appearance to this action, the fact that appellee did not insist upon the general appearance on the first hearing before the Circuit Court of Appeals, appellants could not now be in court. I also notice no authority is cited for the proposition and presume none can be found. If by fil-

ing the pleadings which will be noticed now, appellants made a general appearance and came into court, no act of counsel can "waive" them out of court. The only remedy laid down in the books, is for the appellants to ask the court to be allowed to withdraw the objectionable pleading and not having done so, they are in court, whether the pleadings are called to the attention of the appellate court by counsel or the court of its own motion, takes cognizance of same. Appellee cannot waive them out of court. They must get out upon their own motion, if they are entitled to get out.

In this argument we have tried to confine ourselves to the record and we propose to argue the questions submitted to this court and the facts found therein and shall not travel out of the record and the questions and attempt to show a different state of evidential facts or to PRESUPPOSE or to SUBSTITUTE questions of our own findings which we may think arise in the record, for the questions submitted to this court by the Circuit Court of Appeals, as they are allowed to do under the law.

II.

We understand from the decisions of this court in the cases of Bardes vs. Bank, 178 U. S. 524; Mitchell vs. McClure 178 U. S. 539 and Hicks vs. Knost 178 U. S. 541, that Section 2 of the bankrupt act confers jurisdiction upon the District Court to entertain a suit on behalf of the trustee in bankruptcy to set aside a fraudulent transfer of property, or a preference or to recover a debt due the bankrupt's estate, except, that this jurisdiction is qualified by Sect. 23 b of the Act and by reason of that qualification, this jurisdiction can only be exercised, when the defendant consents to be sued in that court.

The first question then brings up for the considera-

tion of this court what consent is necessary, in order that the district court may entertain such a suit: whether the pleadings filed in this cause, evidence such a consent as is contemplated by Congress.

We do not understand the decision above mentioned to mean that the consent confers jurisdiction upon the district court. Consent of parties cannot give jurisdiction to a court. The law making power whether it is Congress or the legislatures of the various States clothes the courts with jurisdiction; the parties go to the courts having jurisdiction and their consent cannot confer or clothe courts with jurisdiction. That is the province of the law making power and consent of parties cannot take the place of the law making power, so far as conferring jurisdiction upon courts established, either by Acts of Congress or the Constitution of the United States. If the courts have no jurisdiction over the subject matter of the suit, consent of parties engaged in a litigation in that court, so far as it effects jurisdiction, is a nullity. It is perfectly competent for Congress to confer upon the defendant a personal exemption or a personal privilege, exempting the defendant from being sued in certain courts and we think the provision, found in Sect. 23 b of the bankrupt act is of such a character. It does not profess to confer jurisdiction upon any courts whatever but as has been held in the Bardes vs. Bank case, supra, is a limitation. It provides the courts where, or in which, suits by the trustee shall be brought and assumes, that, so far as the district court is concerned, jurisdiction is already conferred upon that court by Sec. 2 of the Act. This section must be construed, so as to find a grant of jurisdiction under the various provisions of the Act. The grant of jurisdiction in Section 2 is to the District Court, subject to this limitation and this section

2 is the only section in the act granting jurisdiction to any court to entertain any suit whatever.

This section 23 b plainly assumes that the district court has jurisdiction and the proviso gives to the defendant a personal exemption to being sued in the court having jurisdiction EXCEPT WITH HIS CONSENT. Otherwise, you have Congress passing an act containing the absurd provision that a defendant could by his consent confer jurisdiction upon a court over the subject matter of a suit.

Congress has frequently provided a personal exemption to defendants from being sued in certain courts or in certain districts, but in no Act that we are familiar with, has it been allowed for the defendant's consent to confer jurisdiction on a Court or the parties to a suit, by their consent, confer jurisdiction upon a court, where without that consent the court would be wholly without jurisdiction, over the subject matter of the suit.

An illustration of this principle is found in the acts of Congress of 1789 (1 Stat. at Large, 73); Act of Congress, February 28th 1839 (5 Stat. at Large, 321) and in the present Judiciary Act of 1887 (24 Stat. at Large, 552) as amended in 1888 (25 Stat. at Large, 434) and also the act relating to suits against National Banks, under National Bank Act of June 3rd 1864 (13 Stat. at Large, 99) and the act to correct Errors etc. February 18th 1875 (18 Stat. at Large, 316-320).

The act of 1887 as amended in 1888 provide:

> "No civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other District than that whereof he is an inhabitant."

Yet in all of the cases decided by this court, it is held that,

> "The right to insist upon suit only in the district is a personal privilege, which the defendant may waive and which he does waive by pleading to the merits."
>
> *St. Louis & San Francisco R. Co. v. McBride, 141 U. S. 127.*

Under the statute, Act of February 18th 1875 it is provided with regard to suits against National Banks:

> "That suits, actions and proceedings against any association under this title may be had in any circuit district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Mr. Justice HARLAN, in delivering the opinion of the court in the case of First National Bank of Charlotte, N. C. v Morgan, 132 U. S. 141 says:

> "No reason can be suggested why one court of a state, rather than another, both being of the same dignity, should take cognizance of a suit against a National Bank, except the convenience of the bank. And this consideration supports the view that the exemption of a National Bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

Upon a consideration of the provisions in section 23 (b) it will appear that they are not near so strong or sweeping as the acts of Congress above mentioned and in view of what the Court has said in the cases cited

supra, we think that this provision confers upon the defendants a personal exemption only which may be waived or exercised as can be done in other cases.

The appellants in this case have made a general appearance and this general appearance waives any objection and they are therefore properly in court.

We submit they have made a general appearance:—

First:— By filing or demurrer to the bill, for lack of equity therein, and claiming that the remedy of complainant was at law and not in equity.

Second:— By filing an answer to the Supplemental bill in this cause.

Third:— By filing affidavits and contesting the appointment of the Receiver, as appears by the record on page 16.

First:—The appellants, Wall & Huske, BEFORE DEMURRING TO THE JURISDICTION TO THE COURT TO PROCEED WITHOUT THEIR CONSENT, demur to the proceedings on the equity side of the docket and this plea or demurrer is in these words—as appears in the record at page 14:

> "Defendants specially appearing under protest of the purpose of this plea and for no other, say: "That the complainant, as trustee, if he has any right to the stock of goods described, has a plain, clear and adequate remedy at law to recover same from these defendants and is not entitled to evoke the equitable jurisdiction of this court to enforce the right, and that this Honorable Court, sitting as a court of Equity has no jurisdiction to hear and determine the question as a court of equity."

This demurrer to the equity in the bill makes the appearance, a general one.

> "The rule to be extracted from the decisions on the subject as to when a special appearance is converted into a general appearance, is, that where the defendant appears and asks some relief which can only granted upon the hypothesis that the court has jurisdiction of the cause, it is a submission to the court as completely as if he had been served with process, whether such appearance, by its terms, be limited to a special purpose or not."

Enc'y Pleading and Practice. Vol. 2 page 625.

Mr. Justice FAIRCLOTH (Late Chief Justice) says in the case of McMinn v Hamilton, 77 N. C. 300:—

> "Where a court has no jurisdiction of the subject matter, the objection can be taken at any time, and indeed as soon as this fact is discovered, the court MERO MOTU will take notice of it and dismiss the action. But if it has jurisdiction of the subject matter and the venue is wrong, the objection must be taken in apt time: and if the defendant pleads to the merits of the action, he will be taken to have waived the objections. HE CANNOT HAVE TWO CHANCES."

The Supreme Court of Wisconsin in the case of Laws v Stringham, 14 Wis. 222, says:

> "The reason that under such circumstances a special appearance is converted into a general one is, that otherwise the defendant would be given an advantage: after objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and, if it resulted

> in his favor insist upon the judgment as good for his benefit; but if it resulted against him, he could set it all aside upon the ground that he had never been properly before the court at all. If the party wishes to insist upon the objection he is not in court, he must keep out for all purposes except to make that objection."

The demurrer to the bill for lack of equity was a general appearance and notwithstanding, in the same pleading, all filed at the same time, the appellants demur to the jurisdiction of the court over their persons, they are in court for all purposes.

> "Any challenging the sufficiency of a pleading is a general appearance; by interposing a demurrer to the complaint or declaration, the defendant makes full appearance."
>
> *Enc'y of Pleading and Practice, Vol. 2 page 645.*
> *Hale v Continental Life Ins. Co. 12 Fed Rep. 359.*

It has been held by this court in the case of New Jersey v New York, 6 Pet. 283, Chief Justice MARSHALL delivering the opinion, that a demurrer to the jurisdiction of this court to entertain a suit between two states, is a general appearance by the defendant.

In the case of Jones v Andrews, 10 Wall. 327, the defendant was sued out of the district in which he was a resident. Mr. Justice BRADLEY, delivering the opinion of the court construing the act of February 28th 1839, (5 Stat. at Large, 321) says:—

> "In this case, Andrews was a necessary party, and he was not a resident of the district and was not served with process; but he voluntarily appeared. It is true that as soon as he appeared, he moved a dismissal of the bill on two grounds.

(1) That it did not show such facts in regard to the citizenship or residence of the defendant as to give the court jurisdiction. (2) That it contained no equity. Whether if he had made the motion on the first ground alone he would waive his personal exemption, it is not necessary to decide. His motion to dismiss for want of equity was clearly a waiver and he was properly required to answer the bill."

In the very recent case of St. Louis and San Francisco R. Co. vs. McBride, 141 U. S. 127, where the defendant filed a demurrer on three grounds, as follows:

(1) Because the court had no jurisdiction of the person of the defendant.

(2) Because the court has no jurisdiction of the subject matter.

(3) Because the complaint does not state facts sufficient to constitute a cause of action.

Mr. Justice BREWER, delivering the opinion of this court says:—

"Neither can the other contention of the plaintiff in error be sustained. Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise to question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based upon three grounds—two referring to the question of jurisdiction and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction,

SUCH APPEARANCE WAIVES NOT ONLY ALL DEFECTS IN THE SERVICE, BUT ALL SPECIAL PRIVILEGES OF THE DEFENDANT IN RESPECT TO THE PARTICULAR COURT IN WHICH THE ACTION WAS BROUGHT."

In addition to the foregoing authorities from this court the following cases from the Supreme Courts of the different States hold the same.

Protective Life Ins. Co. vs. Palmer 81 Ill. 88.
Kegg vs. Welden 40 Ind. 550.
Knight vs. Law 15 Ind. 374.
City of Crawfordsville vs. Hay 42 Ind. 200.
Chapin vs. Fulkerson 95 Ky. 577.
Evans vs. Iles 7 Ohio St. 233.
Myers vs. Smith 29 Ohio St. 130.
Coffee vs. City of Chippewa Falls 36 Wis. 121.
Ency. of Pleading and Practice Vol. II page 628.
Beach Modern Equity Practice Vol. I page 261.

A demurrer on the ground of want of equity in the bill and want of jurisdiction in the court, over the person of the defendant, waives the objection to the jurisdiction of the court.

Merrill vs. Haughton 51 N. H. 61.
Elliott vs. Lawhead 43 Ohio St. 171.

In the case of Gilbert vs. Hall 115 Ind. 549, the Supreme Court of Indiana, says:—

> "A special appearance may be entered for the purpose of taking advantage of any defect in the notice or summons or to question the jurisdiction of the court over the person in any other manner; but filing a motion or demurrer which pertains to the merits of the complaint or petition, constitutes a full appearance, and hence a submission to the jurisdiction of the court."

In the case at bar the appellants, strenuously insisted upon the first demurrer as will appear by the opinion rendered by his Honor Judge EWART, Vol. 99 Fed. Rep. 546 and also in the Circuit Court of Appeals as appears by the opinion of his Honor Judge WADDILL.

This demurrer is in effect a motion of non-suit and appellants have taken two chances; one, as to equity arising upon the facts stated in the bill, and the other as to the jurisdiction of the court to proceed without their consent. Upon a failure of the courts to sustain the first contention, they have resorted to the second, but in having insisted upon the demurrer to the equity in complainant's bill, they have submitted to the jurisdiction of the courts and have waived their personal privilege. When they challenged the equity in the bill, they necessarily submitted to the jurisdiction of the court by all of the authorities, and they were properly ruled to answer the bill.

Second:—It is argued by the appellants, in what they call their "Reply to the Brief of Appellants," that it was competent for them to file their demurrer to the jurisdiction of the court to proceed without their consent, and after the demurrer was overruled by the court, note their exception, come into court and contest the case. In support of this contention, they cite Southern Pacific Co. vs. Denton, 146 U. S. 202; Hardness vs. Hide 98 U. S. 476; In Re Railroad Co. 164 U. S. 633; Steamship Co. vs. Tugman 106 U. S. 118 and other cases. We fail to see the application of the principle decided in those cases to the case at bar. It is perfectly competent under the practice to note exceptions to the court overruling demurrers to the jurisdiction and this exception is saved upon appeal. In the case at bar, that was not done. It does not so appear by the record. The record flatly contradicts such a contention. The

answer and the demurrer to the equity in Complainant's bill appear in the same pleading. In fact, the record shows, after the appellants answered the supplemental bill, they then filed the demurrer to the equity in complainant's bill and as a last part of the pleading, they put in the demurrer to the jurisdiction of the court to proceed in the cause, except with their consent and then for the first time claim that they have not consented. See record pages 13, 14 and 15.

This pleading concludes with a prayer for the "judgment of this honorable court whether they shall be compelled to make any further or other answer to the bill of complaint herein or to this motion for the appointment of a receiver or for an injunction or for any of the matter and things therein contained, and pray that the motion of complainant for the appointment of a receiver and for this injunction be denied by this honorable court, and that they be hence dismissed with their reasonable cost in this behalf sustained.

"And further defendant prays that the original bill of complaint filed herein be dismissed by this honorable court and that these defendants recover their reasonable cost in this behalf sustained."

The affidavits upon which the appointment of a receiver was considered were all filed at the same time and as a part of the same pleading as appears by page 16 of the record.

If appellants did not intend to make an appearance in the cause, they should have filed their plea in abatement, and upon same being overruled, noted their exception or appealed if they so desired. That has been always the practice in the courts and has received the

sanction of the court in the case of McLish vs. Roff 141 U. S. 662. and under such circumstances the appellant lose no rights. But in the case at bar, all of the pleadings were filed at one and the same time, all considered together—all considered by the court at one and the same time and no exception appears in the record and in fact none was taken. An inspection of this pleading shows that it does not admit all of the facts as contended by appellants. In fact it denies everything set out in the supplemental bill, except trifling matters of form, alleged therein.

They further contend that the time for pleading on their part had not arrived, and that therefore this is not a pleading to the merits. This is not true in fact nor does it so appear by the record. The last prayer in the pleading prays the judgment of the court as to whether they shall plead further and also concludes with a prayer for the dismissal of the bill.

There was never but one order made by the district Judge—EWART. The same order which appointed the Receiver in the suit and authorized him to reduce the property to money was the order which overruled the plea or demurrer. (See Record page 16.) It is elementary that a defendant cannot demur and answer, at the same time; that the answer will supersede the demurrer. Also the defendant can not demur to the jurisdiction of the court to appoint a receiver and at the same time file affidavits contesting the appointment of a receiver on the merits. The appellants did so in this cause and the court properly, as we submit, disregarded the demurrers and appointed the receiver.

The appellants cite as authority the case of In re Nugent recently decided by the Circuit Court of Appeals of the sixth Circuit, 105 Fed. Rep. 581 and while

the record in that case shows that Nugent did not go into court voluntarily and many other things not shown in this record which an examination will disclose, we will not discuss same, as the cause has just been removed to this court by certiorari and the parties in said suit are represented by learned counsel and we do not think under the circumstances that the case can be cited as authority by any one.

We think that if the appellants answered the supplemental bill, setting up matters of fact to be passed upon by the court, that this would be a general appearance, notwithstanding they claim in the same answer or pleading, that, THEY DO NOT CONSENT TO THE JURISDICTION OF THE COURT, and it only remains to be seen whether this pleading is an answer.

This pleading on pages 13, 14 and 15 of the record is divided into two separate and distinct parts or sections. The first part or section contains the answer and the second part contains the demurrers.

The facts under which this pleading was filed, were: Cox, trustee, filed his bill in the district court. The stock had been locked up and in the possession of the receiver and other orders of the court and was deteriorating in value. The receiver was not authorized to sell the stock and hold the moneys and after the subpoenas were issued and served upon the appellants, Cox, trustee, then filed his supplemental bill before Judge EWART, and attached thereto, a copy of the original bill. Judge EWART acting upon these papers, gave the defendants notice to show cause before him at Charlotte, N. C., on December 18, 1899, why a receiver should not be appointed and ordered to reduce the property to money, and hold the proceeds thereof. The hearing was continued from day to day until on January 6th,

1909, in compliance with his honor's order, this pleading was filed. See record page 13.

This pleading was considered as an answer by Judge EWART, that is, the first part as an answer and the second part as a plea or demurrer, as appears by his order on page 16 of the record, which is in part, as follows:—

> "In the above entitled cause, the plea to the jurisdiction of the court filed by respondents is overruled. On the reading and consideration of the bill of the plaintiff AND ANSWER of the respondents, IT IS ORDERED, ADJUDGED AND DECREED, ETC."

The second part of this pleading has always been considered as demurrers to the equity in the bill and to the jurisdiction. The first section has been considered by counsel for appellee and by the courts as an answer to the supplemental bill.

The office of a plea in equity, as stated in the Encyclopoedia of Pleading and Practice, Vol. 16 at page 587, is as follows:—

> "A plea in equity is a pleading by which the defendant sets up a single fact, or several facts converging to one point, as a cause why the suit should either be dismissed, delayed or barred. It presents some distinct fact which admitting the bill to be true, of itself creates a bar or avoids the necessity of going into the the evidence at large."

Mr. Justice BREWER in rendering the opinion of the court in the case of the United States vs. California and Oregon Land Co. 148 U. S. 31, 38, says:—

> "And the unquestioned right of a defendant in

an equity suit is to let the facts averred in the bill go unchallenged and by a plea set up some special matter, which if established and sufficient, will defeat any recovery."

Is there any special matter set up in Section I of this pleading which will prevent the complainant from his recovery, if established and sufficient? Certainly not. When we analyze this pleading, it appears as nothing more nor less than a complete, full and sufficient answer to the supplemental bill, filed by Cox trustee.

It will appear by an inspection of this pleading, that both are entitled in the same cause and in exactly in the same manner. The allegations in the bill, are answered sereatim—in this pleading.

The first allegation in the supplemental bill of complaint, as appears by page 2 of the record:—

"Your orator Walter O. Cox, trustee of the estate of W. H. Gilberlt, trading etc. and a citizen and resident of said state of North Carolina and District aforesaid, shows unto your Honor that he has already filed in the District Court of the United States for the Western District of North Carolina, sitting as a court of Bankruptcy, the court having jurisdiction of J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, being citizens of said state and inhabitants of said district, a bill of complaint against the said John D. Wall and T. W. Huske, partners, trading as Wall & Huske, seeking to set aside a certain sale of the stock of hardware made by the bankrupt W. H. Gilbert to the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, and also for the purpose of cancelling of a certain paper writing

purporting to be a bill of sale or deed, executed by the said bankrupt to the said respondents, under date of October 11th, A. D. 1899, and also for other relief as appears more fully by an inspection of the original bill of complaint filed in said cause. That the property so transferred or sold, to-wit: the stock of hardware, store fixtures and accounts, is within this district and in the jurisdiction of this court. Your orator respectfully refers to the said bill of complaint for a more particular statement of the contents thereof, and your orator files herewith a true copy of said bill of complaint and prays that your Honor will take the same as a part of this ancillary bill.

"Your orator further shows that all the state-statements contained in said bill are true as he is informed and verily believes and he repeats the same herein."

The answer of the appellants, Wall & Huske, to this allegation is found on page 13 of the record, and is as follows:

"That they admit the complaintant filed in the District Court of the United States for the Western District of North Carolina, a bill of complaint against defendants seeking to set aside a certain sale of the stock of hardware made by W. H. Gilbert to the defendants; all of which will appear by said bill of complaint and an inspection thereof. The defendants admit that the stock of hardware, store fixtures and accounts is within this district, to-wit: is situated in the city of Winston, N. C., in a storehouse and warehouse therein."

The second allegation in the supplemental bill, as appears in the record page 11, is as follows:

> "And your orator shows to your Honor that the process in said bill has been duly issued and served upon the respondents therein named, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, by the marshall of this Honorable Court."

The answer of the Appellants to this second allegation appears in the record on page 14, and is in the following words:

> "Defendants further admit that a subpoena has been duly served upon these defendants, issued by the District Court of the United States aforesaid at the time of the filing of the bill of complaint."

The third allegation in the supplemental bill of complaint as appears on the record pages 12 and 13, is as follows:

> "And your orator further shows that the property in question is a large and valuable stock of hardware, store fixtures and accounts, and the said property as aforesaid, is deteriorating in value and damaging by reason of being stored in the building known as the Vaughn building in the city of Winston, N. C. and your orator further shows to your Honor that the cost of storage amounts to about $50 per month, besides the other necessary expenses, such as insurance, etc."

The answer to the third allegation is found in this pleading on page 13 of the record and is in these words:

"The defendants further admit that the stock of hardware, store fixtures and accounts is of value as appears in an answer of these defendants to which reference is made and which will be duly filed in this cause, should the court demand the filing of said answer after hearing the motions, and demurrers and pleas of these defendants as will be presented.

"Defendants admit that said property is deteriorating in value and damaging by reason of being locked up in a store house and warehouse under the restraining order of the court, obtained at the instance of creditors of the baukrupt W. H. Gilbert, the creditors aforesaid being the same as obtained the appointment of complainant trustee of W. H. Gilbert, bankrupt, and who obtained the issuing of the subpoena and obtained the filing of the bill of complaint in the said action."

The fourth allegation in the supplemental bill of complaint appears on page 12 of the record and is in the following words:

"And your orator further shows that no inventory has ever been taken of the property and there is no way known to your orator to come to a fair and equitable valuation of said property."

The answer to the fourth allegation on the part of the appellants is found in this pleading on page 14 of the record as follows:

"Defendants deny that no inventory has ever been taken of said property, and that there is no way to come to a fair and equitable value thereof."

The fifth allegation of the supplemental bill is as follows:

> "And your orator further shows that respondents are threatening to dispose of, sell and intermingle, if they are permitted to do so, without taking or permitting to be taken any inventory of said property."

The answer of appellants to this allegation is as follows;—(Record page 14).

> "Defendants say that they are not now threatening to dispose of or sell said property by reason of the injunction of this court; that they have not intermingled the goods purchased by them from W. H. Gilbert with their own stock of hardware, and that the only removal of goods which has been made from the one store to the other APPERS FULLY BY EXHIBITS 1, 2 AND 3 HERETO ATTACHED."

The sixth allegation in the supplemental bill is as follows: (Record page 12).

> "That the respondents are men of small means, having bought or pretended to buy said stock of goods, fixtures and accounts wholly on credit, and cannot respond to your orator in damages, even if the true inventory and value of the said stock was known, by which means your orator will suffer irreparable loss and damage if the said stock is permitted to be sold, intermingled or otherwise disposed of by the said respondents."

The answer to the seventh allegation of the supplemental bill is as follows:—(Record page 14).

> "Defendants admit that they are men of no very large means, but aver that they are respon-

sible and able to pay any damages and amounts which may be adjudged against them by this court or any other court by reason of this disposition of said goods.

"Defendants deny that they have pretended to buy the said property from the said W. H. Gilbert, but allege and aver that they have actually purchased and paid for same as appears by their answer to which reference is made aforesaid."

"Defendants deny that the complainant will sufier any irreparable loss or damage if this stock is permitted to remain in possession of defendants and disposed of by them. And in support of this plea of defendants they respectfully refer to their answer in aid of this their plea."

From the foregoing analysis of this pleading, it appears that every allegation of the supplemental bill of complaint has been answered either admitting the truth thereof or denying it. The appellants call this pleading, A PLEA, but the court will look throught the form and decide from the substance whether it is a plea or a full and complete answer. Calling a pleading by one name does not change its character and when it appears so fully as this does, that this is an answer duly filed in the cause, there can be no question but that the appellants have made a general appearance. Every issue which can possibly arise on the trial of this cause, is raised in this supplemental bill of complaint and this answer.

It is a pleading to the merits of the controversy, REFERS PARTICULARLY TO THE ANSWER OF THE DEFENDANTS IN THE SUIT, which by such reference this answer to the original bill becomes a part and parcel of this pleading.

"Any pleading to the merits by means of an answer, plea, or by any informal manner attacking plaintiff's case is a general appearance."

Enc'y Plead. and Prac. Vol. 2 pg. 636.

The Supreme Court of California, in considering the case of In re Cohen, 5 Cal. 494, where the District Court ordered A and B to be served with a rule to show cause why they should not be commanded to deliver to a receiver, appointed by the court, in a cause to which they were not parties, certain personal chattels held by them, who, in obedience to said rule, appeared and contested the matter before said court,

Held, "That when they appeared and filed their answer to this rule, the court acquired full jurisdiction over the subject matter of the suit and the persons of the defendants."

To the same effect see Henderson vs Carbondale Coal Co. 140 U. S. 25 at page 40.

Mr. Chief Justice FULLER in delivering the opinion of this Court in the case of Texas & Pacific R. Co. vs Cox, where a Receiver had been sued in a district whereof he was not a resident, had interposed a demurrer to the jurisdiction and had filed an answer as in the case at bar, uses the following language:—

"It is said further that jurisdiction over the receiver, personally was lacking because the defendant Brown resided in the Northern District of Texas and defendant Shelden was an inhabitant of Louisiana; and that under the Act of 1887 the action could not be instituted in a District whereof neither of the defendants was an inhabitant. If the suit be regarded as merely ancillary to the Receivership, the objection is without force, but irrespective of that, this im-

munity is a personal privilege which may be waived. The defendant not only demurred but answered and the second ground of demurrer was that the petition did not set out a cause of action. Under such circumstances they could not therefore challenge the jurisdiction of the court on the ground that the suit had been brought in the wrong District."

Texas & Pac. R R Co. v Cox, 145 U. S. 593.
Fitzgerald & Mallony Construction Co. v Fitzgerald 137 U. S. 98.
First National Bank v Morgan, 132 U. S. 141.

(III)

The defendants made a general appearance when they filed affidavits before the court below and contested on the merits, the appointment of a receiver in the equity suit.

The record shows on page 16,

> "The motion for receiver and injunction was heard before his Honor Judge EWART at Winston, on the 9th day of January 1900 on the bill of complaint, supplemental bill of complaint of Cox, trustee, and the plea and demurrer of Wall & Huske, AFFIDAVITS OF BOTH SIDES IN SUPPORT OF AND AGAINST MOTION OF RECEIVER, ARGUMENT OF COUNSEL WAS MADE ON BOTH SIDES."

The affidavits filed are not sent up as a part of the record but his Honor Judge EWART in appointing the receiver finds the following facts from the affidavits so filed; (See Judge EWART'S opinion as duly reported

in 99 Fed. Rep. 546 at page 550 or on page .... in the appendix of this brief.)

> "In the case at bar, it appears that this is a stock of merchandise, subject to deterioration and fluctuation in price; that no inventory of the property has been taken and until this is done no correct estimate and value can be placed thereon. That respondents owe $8.000.00 to the Wachovia National Bank of Winston, and that their property is listed at a little more than $9.-000.00, nearly all of which is personal property. In view of these facts in the judgment of the court, it is proper that a receiver should be appointed untill all the equities of the parties interested should be determined by a final decree."

It has been held by the Court of New York, in the case of Cooly v Lawrence, reported in 12 How. Pract. 176, 12 Sup. R. Ct. 605:

> "By appearing by counsel and opposing a motion for an injunction, reading affidavits in opposition to such motion, filing the same with the names of their Attorneys endorsed thereon, defendants appeared unconditionally and submitted themselves to the jurisdiction of the court."

The Sapreme Court of Pennsolvania in the case of McGeorge v Chemical Manufacturing Co. 141 Pa. St. 525, held,

> "That filing an affidavit of defense, the defendant made full appearance to the action."

We respectfully submit that the appellants, by appearing and filing a demurrer to the equity in the bill as appears by the record, made full appearance to the

action, notwithstanding they demurred at the same time and in the same pleading to the jurisdiction of the court to proceed without their consent.

Second:—That the appellants, having filed an answer in the cause to the supplemental bill, raising questions of fact to be passed upon by the court, simultaneously with a demurrer to the jurisdiction of the court to proceed without their consent, they made full appearance in the action.

Third:—That the appellants by filing affidavits and contesting the appointment of receiver, notwithstanding they demurred to the jurisdiction of the court AT THE SAME TIME to entertain the suit without their consent, made a general appearance in the action and were properly ruled to answer the bill.

That having made a general appearance as above set out, they waived any and all rights, privileges and personal exemptions which was conferred upon them by section 23 (b) of the bankrupt act.

That this consent, which is required by section 23 (b) as we submit, does not have to be made "In writing, signed, sealed, and delivered and in North Carolina recorded," but that any course of conduct which under the acts of 1887 as amended by the act of 1888, would amount to a waiver of rights allowed under said acts to a defendant when sued out of his district, would amount to consent under section 23 (b) and that for this reason the first question should be answered in the affirmative.

SECOND QUESTION.

SAID DISTRICT COURT HAVING ADJUDICATED BANKRUPTCY ON ACCOUNT OF AN ALLEGED FRAUDULENT TRANSFER OF THE BANKRUPT'S PROPERTY, AND HAVING APPOINTED A RECEIVER TO HOLD THE ESTATE THUS CONVEYED, HAD IT, IN SAID PROCEEDINGS INSTITUTFD EITHER BY THE ORIGINAL PETITIONERS, THE RECEIVER OF THE COURT, THE BANKRUPT'S TRUSTEE, OR OF THE COURT'S OWN MOTION, JURISDICTION TO BRING IN THE ALLEGED FRAUDULENT TRANSFERREE OF THE PROPERTY THUS CONVEYED IN THE COURT'S POSSESSION, AND DO FULL AND COMPLETE JUSTICE IN ONE LITIGATION ?

In the brief of the appellants and also in what they call their reply to this brief, it is earnestly insisted that this question is not raised by the record. In making up this record, counsel was heard fully by the Circuit Court of Appeals, where the full record and all the facts were under consideration, and notwithstanding counsel's objection, the court found the facts of the case before them, did raise the question submitted thereby. It is even intimated by counsel that the Circuit Court of Appeals of the Fourth Circuit had certified this question, in order to get the opinion of this court, to be used by them in another cause. We fail to see any evidence of such intention and we do not think same can be imputed to the learned Judges composing the Circuit Court of Appeals.

In order, more effectively to escape the consideration of this second question, counsel for appellants, in his argument proceeds upon a statement of facts, made by himself, and then proceeds to say that the law is as he says it is. In a more homely phrase, he laboriously builds up his "man of straw" and then proceeds to knock him down. The questions certified are most certainly a part of the record and most material part of same, and this second question finds certain fundamental facts, to-wit:—"SAID DISTRICT COURT HAVING ADJUDICATED BANKRUPTCY ON ACCOUNT OF AN ALLEGED FRAUDULENT TRANSFER OF THE BANKRUPT'S PROPERTY AND HAVING APPOINTED A RECEIVER TO HOLD THE ESTATE THUS CONVEYED,"* ****** "HAD THE PROPERTY THUS IN THE COURT'S POSSESSION" and then, from this summary of the facts, proceeds to propound the question whether or not the Court, thus situated in relation to the roperty, had jurisdiction to do full justice to all litigants in one litigation.

We think counsel's view of both the facts and the law is erronous and we submit:—

First:—That the Circuit Court of Appeals, in this second question, in certifying the same, has found as a fact that a receiver was appointed in the bankruptcy proceedings and that the district court sitting as a court of bankruptcy, had the property in its possession; that this finding of fact, so certified, is binding upon this court.

Second:—That while the record certified to this court does not contain the order of the district court appointing the receiver, in haec verbis, yet it sufficiently appears from said record, that a receiver was ap-

pointed by the bankrupt court and that the said court had the property in its possession.

The record certified to this court does not profess to be the whole record before the Circuit Court of Appeals.

For instance, the original petition of creditors on page 1 of the record does not purport to be the entire petition of creditors; the petition of creditors for the appointment of the receiver and the issuance of the restraining order,—the adjudication of W. H. Gilbert, as a bankrupt,—the appointment and qualification of Cox, trustee, of the estate,—the subpoenas issued by the court in the ancilliary suit,—the interrogatories to the bill,—the bond filed by Cox, trustee, to maintain this suit in the District Court,—the affidavits upon which the appellants and appellee contested the appointment of the receiver in the ancilliary suit,—the exhibits mentioned in the answer of appellants on page 14 of the record,—the schedules filed by the badkrupt in which he claimed this property as his own,—the orders of the court for the examination of both the bankrupt and the appellants before the court,—the answer of the appellants referred to in the pleading called a "plea and demurrer" as appears on page 14 of the certificate and which was actually filed and is on file now,—the voluminous evidence taken by the court in the cause,—and in fact many other orders made and things done in the bankruptcy proceedings do not appear in this record either in part or in whole. It is argued that the greater portion of the orders made are referred to, and none of them appear in full and from that circumstance it is to be inferred that this order was never made, and if it had been made, it would have so appeared. As a matter of fact, it is not so referred to but it appears by this finding of the fact and by the record in the certificate as we shall notice later, that the ORDER WAS DULY

MADE. The record in this cause is fuller and more complete than is usualin certificates, but it was expressly made so in order that the court could intelligently pass upon the question of consent of defendants as propounded in the first question. This record, as full and complete as it is, does not show and we submit should not show, all of the orders and decrees in the bankruptcy proceedings.

These orders were made in the bankruptcy proceedings proper and the orders which the appellants are seeking to have reviewed in the circuit court of appeals, were orders made in the ancillary equity suit of Cox, trustee, v Wall & Huske, and the orders and things done in the bankruptcy proceeding, not having been appealed from, APPEARS NOW AS FACTS FOUND BY THE CIRCUIT COURT OF APPEALS IN THIS SECOND QUESTION. The record in the suit of creditors v Gilbert, in the bankruptcy proceedings, was entirely foreign to the matters considered by the Circuit Court of Appeals, and whether the fact that a receiver was appointed therein, appeared by record in that court or by admission of counsel in the argument in that court, this court will assume that the findings of fact by the Circuit Court of Appeals and certified by them are the truth, notwithstanding the contrary is maintained by counsel interested in the cause, and this Court will be governed thereby.

To show the absurdity of counsel's contention, we will ask the court to note, that none of the orders in the bankruptcy proceedings proper appear in the record. The order adjudicating Gilbert a bankrupt and the ground upon which the court adjudicated him a bankrupt does not appear anywhere. The order appointing Cox, as trustee, and the bond filed by him to maintian the suit as required by the Acts of Congress and the

rules of the District Court, and in fact none of these orders appear and the appellant's counsel could with just as much force ask the court not to consider either of these questions because of such irregularities, as to insist that the court will not pass upon the second question for the reason given. The fact that the receiver was appointed appears unmistakably in this second question, and we think the court should pass upon both questions.

We do not think under the practice and the rules, that it is either proper or necessary for the record to show affirmatively, facts, which the court in certifying the questions FIND TO BE FACTS IN THEIR CERTIFICATE.

It seems that counsel, in arguing this case, has fallen into the error of considering this case as if it was upon appeal in this court. Upon an appeal or writ of error, the whole record must be sent up to this court, whereas in a certificate, it has been expressly held that the whole record should not be sent up.

Cincinnati H & D R R Co. v McKeen 149 U S 259.
Grazer v Faurot 162 U. S. 435.

But in this case, counsel for the appellants insist that not only the whole record in this cause should be before the court but also the record in an entirely different cause. That it is error for the Circuit Court of Appeals to put in the question, a finding of fact. No doubt it was done for the convenience of this court, to enable them to see exactly what the contention of the parties were, as well as to keep from encumbering the record with extraneous matter which could not possibly effect the result.

It was held that the certificate will be dismissed when the questions imposed upon this court the labor of de-

termining the whole case and all questions of law which may be lurking in the record.

Cross v Evans, 167 U. S. 60.

The Circuit Court of Appeals for the second circuit, in considering what should go into the record in the case of Signafus v Porter, 85 Fed. Rep. 689, say, that under the rule it it is fundamental facts which are to be STATED and not the evidential facts from which the fundamental facts are found.

Jewell v Knight 123 U. S. 426.
U. S. v Union Pacific R. R. Co. 168 U. S. 505.
Grazer v Faurot Supra.

The Circuit Court of Appeals, having certified as a fact that the Act of Bankruptcy in this case was this fraudulent transfer and that the court appointed a receiver in the bankruptcy proceeding and the court had the property in its possession, this court will take these facts as found and the statements contained in the certificate as conclusive.

Fire Ins. Asso. v Wickham 128 U. S. 426.
Dublin Township v Milford etc. 128 U. S. 510.

But it is further argued that this position is contradicted by certain recitals in the certificate and counsel quotes from the record to shqw that Wall & Huske was in possession of the property and not the court. We have already in the former portion of this brief, called the attention of this Court to counsel's method of quoting the record and we will have to do so again. The phrase to which he refers, has absolutely nothing whatever to do with the stock of goods in the hands of the Receiver. That refers to the small portion of the property in the possession of the appellants, which they succeeded in getting hold of, before tne institution of the proceeding

in bankruptcy and as to that a reference to the page from which he quotes, it will be noticed that the record expressly states that "At the expiration of the injunction, as per order of Judge EWART, of November 6th 1899, counsel for Wall & Huske agreed that the stock of goods should not be removed until Cox, trustee, should qualify and bring suit, as if injunction in force." See Certificate page 13.

This recital is only the second paragraph below what is quoted in brief of the appellants and shows how that was; that in regard to the small amount of goods they had been able to get hold of, the court said to them, "hands off" and this was obeyed even after the qualification of Cox, trustee.

Judge WADDILL, delivering the opinion of the Circuit Court of Appeals, which is expressly made a part of the certificate, by reference on page 17 of the certificate, uses this language: (Vol. 101 Fed. Rep. at page 410, appendix of this brief, page ....)

> "The title to the property alleged to have been fraudulently conveyed by the express terms of the act, as of the date of the adjudication, vests in the bankrupt's trustee upon the assumption of the transfer being void and THE BANKRUPT COURT HAS, AS AUTHORIZED BY THE ACT, APPOINTED A RECEIVER TO SEIZE AND TAKE CHARGE OF THE PROPERTY INVOLVED, AND NOW IN FACT HOLDS THE SAME. Can it be seriously claimed that in such a case, with an officer of the court before it with property thus vested in him and the same seized by the court and brought in for the benefit of creditors, the court is powerless to afford relief either to its own officer, or to the creditors of the bankrupt, because of the rights of an alleged fraudulent transferree are involved, and

that on that account the hands of the bankrupt court should be stayed until the question of the transferree's rights can be determined in a state court? This cannot be the law. THE PROPERTY IS IN CUSTODIA LEGIS, and all persons having interest in it or claiming title to it have necessarily to come INTO THE COURT HAVING IT IN CHARGE. Any other course would be unheard of. It would be to except the United States District Court from the otherwise universal and fundamental rules, principles, and practices of courts of justice in respect to property lawfully under their control."

A casual reading of this opinion will show conclusively that the exact point in the case was the fact that the court, not the district court but the bankrupt court, had the property in the possession of a receiver and that the possession of this receiver was the possession of the court. That the property was in custodia legis, not in the district court, but as a court of bankruptcy, the identical court in which this equity suit of Cox, trustee, v Wall & Huske was brought. It is argued that the learned Judge used the words District Court and Bankrupt Court interchangeably; that some time he would call the court by one name and then again he would call it something else. A reading of this opinion, will show conclusively that Judge WADDILL, when speaking of a Receiver, meant the Receiver appointed by the bankrupt court in the bankruptcy proceedings. We do not think the court would have been guilty of the absurd and nonsensical judgment, OF ATTEMPTING TO SUPPORT THE JURISDICTION OF THE DISTRICT COURT, IN THE SUIT WHERE ITS JURISDICTION WAS CHALLENGED APPOINTED A RECEIVER. We think that view of

the matter is fair and just to the Court below, especially after they have certified, the only ground upon which this case was decided before them to this court for its advice thereon. This was the main point in the case. This was the reason and the only reason given in the decision for upholding the jurisdiction of the court.

While in the case of In Re Baundenine decided by the Circuit Court of Appeals for the second circuit, reported in Vol. 101 Fed. Rep. page 574 and the case of Hall v Kincell decided by the Circuit Court of Appeals of the ninth Circuit reported in Vol. 102 Fed. Rep. page 301 the jurisdiction of the District Court was sustained on other grounds. Judge WALLACE delivering the opinion of the Court in the case of In re Baundenine, holds that the District Court had jurisdiction because the cause under consideration was one which arose out of the bankruptcy proceeding and that it was not such a cause of action as the bankrupt could have brought. And in the case of Hall v Kincell, the broad position was taken by Circuit Judge MORROW that the Court had jurisdiction under Section 2 of the Act and that section 23 (b) did not effect that grant of jurisdiction ; but in this case, the jurisdiction was sustained only because the Court had possession of the property and when the Court certify questions to this Court for its advice, they certify the exact question upon which they decide the case upon the former hearing.

Since it seems that because the court below has not seen fit to send up the whole record in this cause, to show that the Court and not the defendants were in possession of the property and in view of the labored argument of counsel for the appellants, insisting that the defendants were in possession and that this second question cannot be considered by this court, we will note what the appellants themselves have to say about

the possession of the property. They are on record in their answer on page 14 of the certificate, and they swear, upon their oaths, the following to be the status of affairs, when Cox, trustee, began his suit:—

> "Defendants admit that said property is deteriorating in value and damaging by REASON OF BEING LOCKED UP IN A STORE HOUSE AND WARE HOUSE UNDER THE RESTRAINING ORDER OF THE COURT OBTAINED AT THE INSTANCE OF THE CREDITORS OF THE BANKRUPT W. H. GILBERT, the creditors aforesaid being the same creditors as obtained the appointment of complainant as trustee of W. H. Gilbert, bankrupt, and who obtained the filing of the bill of complaint in said action. * * * * *
>
> "Defendants further say that they are NOT NOW THREATENING TO DISPOSE OF OR SELL SAID PROPERTY BY REASON OF THE INJUNCTION OF THE COURT, THAT THEY HAVE NOT IN ANY WAY INTERMINGLED THE GOODS PURCHASED BY THEM FROM W. H. GILBERT with their own stock of hardware, and that only removal of goods which has been made from one store to the other appears fully in exhibits 1 and 2 and 3 hereto attached."

While in this pleading it is not admitted that a Receiver was in possession of the property in so many words, yet it unmistakeably appears, that the Court at the instance of the creditors, took possession of the property and at the time the pleading was filed, January 6th, 1900, was in actual possession of same.

An argument is made by the appellants that because the bill states "Wall & Huske went into possession of the entire property aforesaid," that it shows the court

was in possession of the property. Such an argument is misleading unless the facts surrounding the transaction are taken into consideration. The transfer or bill of sale was signed by the appellant and W. H. Gilbert on the 11th day of October 1899, and they did attempt to go into possession of the stock of goods. The next day, the morning of October 12th 1899, the petition in bankruptcy was filed and the injunction issued and stopped them and the store house was locked up by the order of the court.

The other quotation from the bill relied upon by the appellants which contains an allegation requesting Wall & Huske to surrender the stock of goods and setting out their defense thereto, will appear by an inspection of the bill to be what is usually called the "charging part of the bill," and could have been omitted under Equity rule No. 21. It is purely formal so understood by the courts below and counsel and of course admits nothing.

The last quotation from the bill in the argument of the appellants refer entirely to matters which took place prior to the institution of the proceedings in bankruptcy.

As a matter of fact Wall & Huske have never been in possession of the property. Immediately after the alleged sale, the court enjoined them, then continued the injunction to the election and qualification of the trustee and appointed a Receiver to hold the property in tact. After the election and qualification of a trustee the stock remained locked up and in possession of the court. In fact so much is expressly admitted in the "reply to the brief" filed by the appellants in this cause. They say that the only distinction between this case and the case of Bardes v Bank, supra, was that

an injunction was issued. The admission shows the court was in possession of the property by means of an injunction, although, as a matter of fact at the time it was in possession by means of its receiver. Also what intermingling of stock was done, was done prior to the institution of the proceedings in bankruptcy and Wall & Huske, as appears by the certificate, and as is the truth in fact, have not been able to sell, dispose of or interfere with the property since that time on account of it being in the actual as well as constructive possession of the court.

The appellants argued that the Receivership which appears in the certificate was upon the bill in equity by Cox, trustee. That is true; but the moment that Receiver was appointed, THE APPELLANTS APPEALED TO THE CIRCUIT COURT OF APPEALS AND THAT NECESSARILY STAYED THE PROCEEINGS IN THAT BEHALF. The Circuit Court of Appeals does not refer to that Receivership at all and could not do so because the filing of the appeal or petition of review, vacated the order appointing the Receiver in the equity suit of Cox, trustee, v Wall & Huske.

The question certified to this court, is not the right of the Court to appoint the Receivership in that suit, but it is certified to this court, whether or not the court had jurisdiction to entertain a suit on behalf of the Receiver, appointed in the bankruptcy proceedings and to preserve the property until the title could be determined in the usual way. We do not think the jurisdictiction of the bankrupt court to appoint the receiver in the bankruptcy proceedings and to preserve the property in the case, is open for review. The appellants have not appealed from any order made in the bankruptcy proceedings and the question of the validity or invalidity of such an order is not before the court in any form.

The appellants argue that the appointment of the receiver in the suit of Cox, trustee vs. Wall & Huske is the Receivership referred to in the second question and that this being void, appellee is arguing in a circle. "The court having appointed a receiver because it had jurisdiction, and had jurisdiction because it appointed a receiver."

The circle is in the mind of appellants' counsel and not in the straight forward facts and sequence of this case. Under its statuatory powers (Section 2 Sub Sec. 3 and 6 of the Bankruptcy Act) the court took possession of the property by means of restraining order, injunction and receivership. Under its inherent equity jurisdiction, it will entertain ancillary proceedings looking to the administration of same. A glance at the facts of the case will sufficiently show the strength of this position. On October 11th, 1899, the appellants obtained from Gilbert a deed or bill of sale for a large stock of goods, alleged to be worth from $17,000.00 to $18,000.00. They immediately began attempting to obtain possession of these goods and intermingle same with their own stock of hardware, so that it would be impossible to distinguish this stock from their own stock. They had never taken an inventory of the goods alleged to have been purchased and in no way could the value of same be ascertained. The creditors of W. H. Gilbert on the 12th day of October, 1899, the next morning after the sale, filed a petition in involuntarily bankruptcy and obtained from the Judge a restraining order and by virtue of that restraining order, followed up by injunction and receivership, the bankrupt court took actual, manual possession of the stock of goods and the property has been in the possession of the court to this day.

Appellants also mention in their brief that on the rehearing the Judges on the bench of the Circuit Court of Appeals stated that there was a difference between voluntary and involuntary proceedings. All that was meant by that remark was the different status of the property belonging to the bankrupt or alleged to belong to him, until the adjudication. We do not understand from the opinion of Judge LOWELL, quoted so extensively in the brief of appellants in the case of In re Ward, that he differs so materially from the opinion of these Judges, Circuit Judges, GOFF and SIMONTON and District Judge, WADDILL. Every one recognizes that there is a difference in the status of the property and an argument that there is none comes with very bad grace from men who aided and abetted the bankrupt to defraud his creditors and by their active participation in the fraud, committed with the bankrupt, the act of bankruptcy upon which the adjudication was made.

In the case at bar, the appellants were men of small means as appears by their answer on page 14 of the certificate and were insolvent as appears by the findings of fact by Judge EWART, in his opinion in this cause reported in Vol. 99 Fed. Rep. at page 550 (Appendix of this brief, page——) wherein he says, in considering the advisability of appointing a receiver in the bill in equity :—

> "That they (appellants) owed to the Wachovia National Bank, of Winston, $8,000, and they listed for taxation, principally personal property, to the amount of $9,000.00."

Under the circumstances surrounding this sale, and where the alleged fraudulent purchasers were insolvent, why should not the bankrupt court, on petition of creditors, or upon its own motion, or upon petition of the

trustee, take charge of the property in the exercise of its inherent equity powers? What court of chancery would sit by idle and see this large estate pass into the possession of irresponsible men? Especially is this so, when the very act by which these men obtained possession of the property was fraudulent and done with intent to hinder, delay and defraud the creditors of the proposed bankrupt;—was the very act of bankruptcy upon which W. H. Gilbert was adjudicated a bankrupt and was the very act which defrauded the creditors of W. H. Gilbert?

The district court, in the case at bar, by the restraining orders issued and the appointment of this receiver in the bankruptcy proceedings did not pretend to pass upon either the title of the appellants or appellee. It was no summary proceeding to try title to property, which has been denied to the bankrupt court in the cases of Eyster v Gaff 91 U. S. 521; Smith v Mason 14 Wall. 419, 433; Yeatman v New Orleans Sav. Inst. 95 U. S. 764; Marshall v Knox, 16 Wall. 551; and other cases decided by this court in construing the act of 1867. It was no attempt to deny to the appellants their day in court, but it was the exercise of the power of a court of equity, charged by the Act creating it with the administration of the estate, issuing its orders and process to preserve the CORPUS until the matters in controversy could be determined in a regularly constituted suit. But appellants argue that this is a SUBTERFUGE, to get around the clear provisions of section 23 (b) of the bankrupt Act. We do not so understand it. It is not a question of jurisdiction. It is a question of the power of a court, charged by the Act bringing that court into being and creating it for the express purpose of dealing with the estates of insolvents, to hold the matter in STATU QUO until the rights of all parties can be determ-

ined. That was all that was attempted in the case at bar and all that was actually done in the bankruptcy proceedings.

In every involuntary bankruptcy proceeding, some considerable time must necessarily elapse between the institution of the proceedings by the filing of the petition and even to the appointment of the trustee, and a large additional amount of time would elapse until the conflicting claims could be determined in regard to the property.

By reference to the Act we find that section 18 provides that the subpoena must be returned within 15 days and the Rule prescribed by this court provides that it must be executed at least 5 days prior to the return day. Section 18 (b) allows a creditor or the bankrupt ten days longer within which to appear and answer. After the adjudication, by section 7, sub-section 8, the bankrupt has ten days within which to file his schedules. The creditors are entitled to 10 days notice by section 58 of the Act of the first meeting of creditors in order to elect the trustee. So at the very earliest possible moment 45 days, or a month and a half must elapse prior to the election of the trustee. During all this time, what is to become of the property belonging to the estate? Allow it to remain in the hands of the insolvent and pretended purchaser, accountable to no one for its preservation, or shall the bankrupt court, sitting as a court of equity and by virtue of the express provisions of Section 2 Sub-Sections 3 and 5 of the Bankrupt Act, issue its orders and decrees and preserve the property, as was done in the case at bar, until the title to the same can be determined in the usual way by a regularly constituted suit? To state the question is to give the answer. In the case at bar, if the court had not taken possession of the property and

held it by its restraining order, injunction and receiver, in the bankruptcy proceedings, there would have been no estate to administer upon the election of the trustee. The trustee could have brought his suit, sued the pro verbial beggar, made the usual recovery and he would have had his costs for his trouble.

To exercise this power, is not to settle the title to property in a summary manner but is the exercise of the powers of a court of equity and the express provisions of the Act, to preserve the subject matter of the controversy IN STATU QUO until the title can be determined. We do not think that the power of the court to appoint the receiver and take possession of the property in the bankruptcy proceedings is an open one in the case at bar. The order was not appealed from, stands today as a valid order of the bankrupt court in the bankruptcy proceedings, unappealed from by any one.

This point would not have been noticed at all except from the ingenous argument of the appellants in their attempt to leave the impression upon this court that the receivership mentioned in the second question was the receivership in the equity suit of Cox, trustee, v Wall & Huske. The two receiverships, were separate and distinct, appointed by the court for different purposes; the one to hold the property IN STATU QUO, the other to reduce the property to money and hold the proceeds thereof to await the determination of the suit in equity.

The alleged fraudulent transfer to the appellants, being the Act of bankruptcy upon which the adjudication was made and the property being in the possession of the court as aforesaid, can Walter O. Cox, as trustee, file his ancillary bill in the bankrupt court, and have the title to the same determined in one litigation?

Williams v Benedict 49 U. S. 8 How. III.

Hagan v Lucas, 35 U. S. 10 Pet. 400.
Buck v Colbath, 70 U. S. 3 Wall. 334.
Heidritter v Elizebeth Oil Cloth Co., 112 U. S. 294.
Schenkle v Reiman, 86 N. Y. 270.
Union Trust Co. v Rockford, R. I. & St. L. R. Co., 6 Biss. 197.
Sedgewick v Mench, 6 Blatchf. 156.
Young v Montgomery & E. R. Co., 2 Woods 606.
Covell v Hyman, 111 U. S. 183.
Fox v Hempfield R. Co., 2 Abb. (U. S.) 157.
Rio Grande R Co., v Vinet, 132 U. S. 478.
Attleborough National Bk. v Northwestern Mfg. & Car Co., 26 Fed. Rep. 113.
Morrison v Menhaden Co., 37 Hun. 522.

The court which first takes cognizance of a controversy is entitled to retain jurisdiction to the end of the litigation and to take possession and control of the subject matter of the investigation to the exclusion of all interference by other courts of co-ordinate jurisdiction.

Although the bankrupt court has the property in its possession and subject to its orders, must the officer, who is an officer of the court, and giving bond to the United States under Section 50 of the bankrupt Act, go to the court of another sovereignty and there litigate the question of the title to this property with the fraudulent transferree? The district court in adjudicating bankruptcy declared that the transfer was fraudulent,—otherwise it would have refused to have made the adjudication, under section 3 (1) of the bankrupt Act,—now must the trustee go to the court of another sovereignty, have that court to decide whether, IN ITS OPINION, the district court of the United States decided correctly in adjudicating the transfer fraudulent and therefore Gilbert properly a bankrupt? Suppose this State Court should hold that this transfer was perfectly

valid, no fraud that it could see in the transaction and therefore Gilbert should not have been adjudged a bankrupt, what kind of a writ would this state court issue to the receiver of the district court having the property in its possession, to compel said receiver to turn over the property to it in obedience to its mandate?

In United States v Johnson County Supervisors, 73 U. S. 6 Wall. 166,—this court speaking through Mr. Justice CLIFFORD said:

> "State Courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain the process or proceedings in the National Courts. Circuit Courts and State Courts act separately and independent of each other, and in their respective spheres of action, the process issued by the one is as far beyond the reach of the other, as if the line of division was traced by landmarks and monuments visible to the eye."

See also United States v Keokuk, 73 U. S. 6 Wall. 514, 517.
Peck v Jenness, 48 U. S. 7 How. 612, 624.
French v Hay, 89 U. S. 22 Wall. 250.
Keen v Huidekoper, 103 U. S. 94.
Gaylord v Fort Wayne M. & C. R. Co., 6 Biss. 286, 291, 292.
Brooks v Delaplaine, 1 Md. Ch. 354.
Shields v Coleman, 157 U. S. 176.

In the conflicts which would arise between the district court and the state court to determine whether this transfer was fraudulent and Gilbert properly a bankrupt, what court would pass upon it? This court has held it would not do so in construing the Act of 1867 in the case of McKenna v Simpson 129 U. S. 506:—

"The decision of the State Court as to what should be deemed a fraudulent conveyance does not present any Federal question, nor does the application by the court of the evidence in reaching that decision raise one."

Is not the whole difficulty solved by allowing the transferree to intervene in the bankruptcy proceedings, in order to settle the controversy, or if he should refuse to do so, permit the trustee to file his ancilliary bill, or bring his action at law, as the facts of the case require, in the district court as the court of bankruptcy—the court having possession of the RES?

Rouss v Letcher 156 U. S. 47, 50.
Morgan L. & T. R. & S. S. Co. v Texas etc. Co. 137 U. S. 171 201.
M. & M. R. Co. v Soutter 69 U. S. 2 Wall. 609.

Any proceeding by the trustee to settle a controversy in regard to property lawfully in possession of the court, to be administered by the court, in the strictest sense of pleading, would be ancilliary. The proceeding in the case at bar, is involuntary—the original suit is the suit of creditors v Gilbert. Everything depends upon that proceeding. The right of the appellee to maintain this suit in any court, depends entirely upon his right as trustee appointed in the main proceeding of creditors v Gilbert. As a general rule, any proceeding to recover assets of which the court is charged with the administration, is ancillary, whether that court be the State Court or the Federal Court.

Stewart v Dunham 115 U. S. 61, 64.
Richmond v Ireland 121 U. S. 27, 52.
Rouss v Letcher 156 U. S. 47, 49.
Porter v Sabin 149 U. S. 479.
White v Ewing 159 U. S. 36, 37.

Mr. Justice BROWN, delivering the opinion of this court, in the case of White v Ewing, supra, in considering the right of a Receiver of the Circuit Court to bring suit in said Circuit Court to collect the assets of an insolvent corporation against defendants, residents of the same State and where the amount in any one case was less than the jurisdictional amount required, says:

> "In this case, however, the court proceeds upon its own authority to collect the assets of an estate with the administration of which it is charged; and if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction. In this particular the jurisdiction of the Circuit Court does not materially differ from that of the District Court in bankruptcy, the right of which, to collect the assets of the bankrupt's estate we do not understand to have ever been doubted."

From the above quotation, there can be no doubt but that any proceeding on behalf of the trustee in bankruptcy, to recover property to be administered by the bankrupt court, is ancillary to the main suit of creditors to obtain the adjudication. This is especially so where the alleged fraudulent transfer is the act of bankruptcy and the court by means of its statuatory as well as inherent equity power takes possession of the property, without exception on the part of the alleged fraudulent transferree. The only question which remains to be considered is whether the provisions in Sect. 23 b of the bankrupt act operates to oust the court of the jurisdiction.

In considering the first question, we argued that this Sect. 23 b conferred upon the defendant a personal privilege and that he could waive that privilege in any manner analogous to the waiver of exemption to being sued out of his district. That the consent of the parties could not confer jurisdiction upon a court, but jurisdiction was given to the courts by the lawmaking power. We further argued, that this Section 23 b assumed the court had jurisdiction and that this jurisdiction was expressly granted to the District Court in Sect. 2 of the Act. This must be true because Sect. 23 b does not profess to give jurisdiction to any court. It assumes the district court has jurisdiction in the premises but cannot exercise jurisdiction over the person except in those cases where the defendant waived the objection. Consent cannot give jurisdiction to any court.

> "If the case were one of a want of jurisdiction in the court, it would not, according to well established principles, be competent for the parties by any act of theirs to give it."

Toland v Sprague 9 U. S. 12 Pet. 298, 330.

And we further argued that the objection to the jurisdiction of the court to proceed in the case without the consent of the defendants should be brought to the attention of the court by a plea in abatement, not by demurrer, because it did not appear upon the face of the record that the court was without jurisdiction. That the demurrer would only lie where the record showed the court to be without jurisdiction. If the court was without jurisdiction over the subject matter of the suit, objection could be taken at any time, or the court MERO MOTU would dismiss the suit as soon as the want of jurisdiction appeared, or, the parties could raise the objection by any form of pleading they elected to use.

"It is a necessary presumption that the court of general jurisdiction can act upon the given case when nothing appears to the contrary; hence has arisen the rule that the party claim an exemption from its process must set out the reasons by a special plea in abatement and show that some inferior court of law or equity has the exclusive cognizance of the case, otherwise the superior court must proceed in virtue of its general jurisdiction. This rule prevailed both at law and in equity. A motion to dismiss, therefore, cannot be entertained as it does not and cannot disclose a case of exception, and if a plea in abatement is put in, it must not only make out the exception, BUT POINT TO THE PARTICULAR COURT TO WHICH THE CASE BELONGS. A plaintiff in law or in equity is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a second plea to the jurisdiction of that court to which he has driven the plaintiff by his plea. An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue."

Rhode Island v Massachusetts 12 Pet. 657, 719.

A comparison of the statutes of 1887 as amended in 1888, supra, will show that section 23 (b) is not near so strong or sweeping in language or purpose as the above Statutes, yet it was held by this court in the case of White v Ewing, supra, opinion delivered by Mr-Justice BROWN:—

"The question certified does not, as we understand it, demand the opinion of this court as to whether a single bill against all of these defendants would lie for the amounts severally due by them (upon which point we do not feel called upon to express an opinion) ; but whether so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2000.00, the court had jurisdiction to render a judgment against them.

"This question must be answered in the affirmative. As was observed by this court in Porter v Sabin, 149 U. S. 479 when a court exercising jurisdiction, in equity appoints a receiver to hold the property of a corporation, that court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court holds and administers the estate through the receiver, as its officer for tbe benefit of those whom the court shall ultimately adjudge to be entitled to it.

"The Circuit Court obtained jurisdiction over the Cardiff Coal & Iron Co. by the filing of the original creditors bill by Bosworth a citizen of Massachusetts, and by the apppointment of a receiver; and any suit by or against such receiver, in the course of winding up of such corporation, whether for the collection of the assets or for the defense of its property rights, must be regarded as ancilliary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy. Freeman v How, 65 U. S. 24 How. 450, 460; Krippendorf v Hyde, 110 U. S. 276; Dewey v West Fairmont Gas Co., 123 U.

S. 329; Re Tyler, 149 U. S. 164, 181; Root v Woolworth, 150 U. S. 401, 413; Rouss v Letcher, 156 U. S. 47."

The cases cited above, hold, that where the court is charged with the administration of an estate in a creditors bill and through either its equity powers or by statuatory provisions, appoints a Receiver to hold the property with which it is charged, and begins the administration of the estate by means of such receiver, notwithstanding the plain and clear provisions of the Acts of Congress of 1887 as amended by the Act of 1888 the Circuit Court will entertain suits on behalf of such receiver, irrespective of the amount involved or the citizenship of the parties.

It would seem then, unless this principle is over-ruled by the recent case of Bardes v Bank, that notwithstanding the provisions of 23 (b) of the Bankrupt Act, that the district court, being the court empowered and authorized by the Act of Congress to administer estates of insolvents, and in the administration of such estates for the benefit of the parties whom it might ultimately decide entitled thereto, would have jurisdiction of an ancilliary suit to determine the title to property brought into that court by its officer or by the law, irrespective of the consent of the parties. There can be no distinction in principle or law between a trustee in bankruptcy and a receiver of the circuit court. Mr. Justice BROWN in White v Ewing says expressly there is none. The reports are full of cases in which the position of a receiver of the court in relation to property is compared with a trustee in bankruptcy. In the case of Grant v Buckner, 172 U. S. 238, this court uses as an illustration, where the receiver went into the State Court and contested a claim with an adverse claimant,

the case of a trustee; and held that the receiver as well as the trustee was bound by the judgment of the court. This case cites the cases of Mays v Fritton, 20 Wall. 414; Winchester v Heiskell, 119 U. S. 450. In practice there is none. The trustee is an officer of the court and is expressly made an officer by the terms of the Act (Section 33). He is required to give bond to the United States for the faithful performance of his duties and the wording of the bond, as prescribed by Supreme Court Form No. 15 is exactly the wording of a bond required from receivers in the Circuit Court.

It has been a recognized principle of law, that the court having jurisdiction of the RES on the filing of an original bill, will take jurisdiction of bills not original growing out of the first suit, without regard to the citizenship or other exemptions of the parties thereto.

Morgan's L. & T. R. & S. Co. v Texas Central R. Co. 137 U. S. 171, 202.
Clark v Matthewson, 37 U. S. 12 Pet. 164.
Jones v Andrews, 77 U. S. 10 Wall. 327, 333.
Pacific R. Co. v Missouri Pacific R. Co., 111 U. S. 505.
M. & M. R. Co. v Soutter, 69 U. S. 2 Wall. 609.
Krippendorf v Hyde 110 U. S. 276.
Dewey v West Fairmont G. C. Co. 123 U. S. 329.
Gumbel v Pipken, 124 U. S. 131.

And this is so, even if the bill, so called, is an original bill, about and concerning the RES, with parties, not parties to the original suit but interested in the subject matter of the suit.

Minn. Co. v St. Paul Co. 2 Wall. 609, 633.

Whether we consider these cases overruled by the case of Bardes v Bank, as is intimated by Judge LOWELL, In re Ward, supra, there is a clear distinction

between our case and that case. In the case at bar, the Receiver of the court was in possession of the property in controversy—and in our complex system of federal and State jurisdiction, that court whether State or Federal which first acquires jurisdiction of any subject of litigation must retain it to do full and complete justice between the parties; and not only to the parties to the record, but between them and any third person, not a party to the record, as to the subject matters of the litigation of which it has acquired jurisdiction. If, in the exercise of its jurisdiction, a federal court, be it, the district court, the bankrupt court, the circuit court, or the State court, by its receiver, its marshal or by injunctive process, comes to have the custody of property, either real or personal, a third person, not a party to the record or proceedings but claiming any right to or interest in such property, must come into such court and there litigate his rights.

No State court can entertain any suit with regard to property so held; and for that reason the federal court will sustain a suit in equity either to protect the rights of the third person or enforce the rights of its officers without regard to the citizenship and without regard to personal privileges of the parties because such a suit is not original but ancilliary and supplemental to the original suit out of which the question arises.

Freeman v Howe 65 U. S. 24 How. 460.
M & M R Co. v Soutter 69 U. S. 2 Wall. 609.

This principle is given the broadest scope in the case of Porter v Sabin, 149 U. S. 478, wherein certain stockholders of an insolvent corporation, which had been placed in the custody of a Receiver by a State Court, brought suit in the Circuit Court of the United States, against officers of the corporation who had fraudulently misappropriated its property.

Mr. Justice GRAY delivering the opinion of this court says:—

"When a court exercising jurisdiction in Equity appoints a receiver of all of the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court, and the court itself holds and administers the estate through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it." (Citing Wiswall v Sampson, 55 U. S. How. 52, 65; Peale v Phipps, 55 U. S. 14 How. 368, 374; Booth v Clark 58 U. S. 17 How. 322, 334; Union Bank of Chicago v Kansas City Bank, 136 U. S. 223; Thompson v Phoenix Ins. Co. 136 U. S. 287, 297. (This paragraph is cited and approved in the case of White v Ewing, 150 U. S. 36, supra.)

"It is for that court in its discretion, to decide whether it will determine for itself ALL CLAIMS OF OR AGAINST THE RECEIVER, or will allow them to be litigated elsewhere. IT MAY DIRECT CLAIMS IN FAVOR OF A CORPORATION TO BE SUED ON BY THE RECEIVER IN OTHER TRIBUNALS, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of: and no suit, unless expressly authorized by statute, can be brought against the Receiver without the permission of the court which appoints him. Barton v Barbour, 104

U. S. 126; Texas & P. R. R. Co. v Cox, 145 U. S. 593, 601.

"The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the Receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of a corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remain in its custody to be administered and dis ributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of one government can by collateral suits assume to deal with RIGHTS OF PROPERTY OR OF ACTIONS, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. Wiswall v Sampson, 55 U.S. 14 How. 52; Peale v Fitts, 55 U. S. 14 How. 368; Barton v Barbour, 104 U. S. 126; Williams v Benedict 49 U. S. 8 How. 107: Pulliam v Osborne, 58 U. S. 17 How. 471, 475; Peoples Bank of Belleville v Winslow, 102 U. S. 256; Heidritter v Elizabeth Oil Cloth Co. 112 U. S. 294."

Such being the law, what sanctity has the Circuit Court which does not extend equally to the District Court?

What are the privileges more sacred to the alleged fraudulent transferree Wall & Huske, in the case at bar

than those belonging to the appellants John H. White and others in the case of White v Ewing, SUPRA? The Act of Congress provides that the Circuit Court of the United States SHALL NOT ENTERTAIN A SUIT where the amount involved does not exceed $2,000.00 and the same act of Congress provides THAT LITIGANTS SHALL NOT BRING A SUIT IN THE CIRCUIT COURT OF THE UNITED STATES, except in the cases therein mentioned, UNLESS THERE IS A DIVERSITY OF CITIZENSHIP AND THEN ONLY IN THE DISTRICT IN WHICH THE DEFENDANT RESIDES, yet in the long line of decisions in this court, beginning almost a century ago,—this court in construing the practice has uniformly held that these provisions shall not apply when the court is in possession of the RES and when the suit is not an original suit but is ancillary, dependent and supplemental, to the main suit.

What is the distinction between the case at bar,—the question certified, and White v Ewing SUPRA? Both are in the nature of creditors' bills. Both are dealing with an estate of an insolvent, charged by the law to distribute the assets belonging to said estate amongst the parties whom the court shall ultimately decide they rightfully belong. Both courts have seized the property and has same in its possession. The one court is represented by a receiver; the other by a trustee. Both officers of the respective courts appointing them.

Is there any difference between the positions of the defendants in the two cases? The one owes money to the insolvent corporation. In the case at bar the appellants by a conspiracy with the insolvent debtor have aided him to defraud his creditors and the transfer so made to them was the act of bankruptcy upon which the adjudication was made. The defendants in the one case were residents of the same district

with the receiver and owed amounts less than the jurisdictional amount of the circuit court; in the case at bar the appellants are residents of the same district with the trustee and the amount involved is sufficient to confer jurisdiction, if the amount alone was necessary; the title to the property by the express terms of the Act Sect. 70 thereof vests in the trustee upon his qualification, unless we assume as proven, what this suit is brought to test.

Under the Act of 1867, In Re Vogel, 7 Blatchf. 19, decision rendered by District Judge BLATCHFORD, whose opinion was sustained by Mr. Justice NELSON, of this court, while on the circuit.

> "It is manifest by these provisions that when a voluntary petitioner files his petition in due form, he becomes, EO INSTANTI, a bankrupt so far as any interference with the property named in his inventory is concerned, and that such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if actually brought into the visible presence of the court. Being in the custody of the bankrupt court, no other court and no person acting under any process from any other court can, without permission of the bankrupt court, interfere with it; and to so interfere, is a contempt of the bankruptcy court."

The court in the case at bar, as certified by the Circuit Court of Appeals, and as a matter of fact, had the property in the possession of its Receiver and the property is in the possession of said receiver to this time. Not only did it issue its restraining order, and its injunction, which we submit places the property in the possession of the court but it had the property in the

possession of its receiver. The appellants admit in what they call their "Reply to this Brief," that the court took possession of the property by injunctive process which under the decision In Re Vogel, is sufficient, and all that is required to place the property in custodia legis. But the court went further than that and appointed a receiver, who now holds the property and this second question presents a question of the right of the court, having possession of the property, to proceed with its administration, irrespecive of any personal exemptions or personal privileges of the defendant.

In the case of White v Schloerb, 178 U. S. 542, where the Referee had the keys to the store, this court decided that the bankrupt court had jurisdiction in a summary manner to restrain the sheriff in a replevin suit and compel said sheriff to surrender the goods. It is asked in this case whether the court having the possession of the property by its receiver can do the same thing in a plenary suit. If the bankrupt court in White v Schloerb, supra, has jurisdiction in a summary proceeding to try title to property wrongfully taken from the court, it should most certainly have the same jurisdiction when it has possession of the property, actually in custodia legis, to pass upon the conflicting claims of the trustee and the third party irrespective of any personal privileges or exemptions of the third party.

The question certified in the case is not the question decided by this court in Bardes v Bank. The questions present to this court the right of the bankrupt court, having possession of the property and, we think the question of jurisdiction of the district court, sitting as a court of bankruptcy, should be determined by analogy to other courts. The Court which has possession of the property in controversy, will retain jurisdiction for all purposes and make a final adjudication among all

parties interested therein; that it has jurisdiction and should exercise it in one litigation, to prevent multiplicity of suits, to prevent conflicts with the courts of another sovereignty, to protect and preserve the property and to finally distribute same amongst those whom the court shall decide ultimately entitled thereto. This has been the practice both in the Federal and State courts.

Re Chetwood, 165 U. S. 443; White v Schloerb 178 U. S. 542; White v Ewing 159 U. S. 36; Porter v Sabin 149 U. S. 473; Chapman v Brewer 114 U. S. 158; Heidritter v Elizabeth Oil Cloth Co. 112 U. S. 294; Krippendorf v Hyde 110 U. S. 276; Hagan v Lucas 10 Pet. 400; Peck v Jenness 7 How. 612; Shawhan v Wherritt 7 How. 627; Wilwall vs Sampson 14 How. 52; Buck v Colbath 3 Wall. 334; Slocum v Mayberry 2 Wheat. 2; Freeman v Howe 24 How. 450; Taylor v Carryl 20 How. 583; Peale v Phipps 14 How 369; Williams v Benedict 8 How. 107.

Respectfully submitted,

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Attorneys for Appellee.

(Swink & Swink, Jones & Patterson, A. H. Eller and D. H. Blair with them on brief.)

Winston, N. C., March 10, 1901.

APPENDIX.

Opinion of Ewart J. as reported in 99 Fed. Rep. 546.

This is a bill in equity filed by the complainant as trustee of the bankrupt for the purpose of setting aside a sale made by the bankrupt Gilbert to the respondents of a certain stock of hardware, the said sale having been made, as complainant alleges, in fraud of the bankruptcy act and in fraud of the creditors of the said estate. The facts are as follows:

Gilbert was a retail hardware dealer in the city of Winston, N. C., carry a stock of $16,000 to $18,000. Becoming embarrassed in June, 1899, he secured an extension from his creditors, executing notes in large amounts maturing December, 1899, and January, 1900. Immediately after securing this extension, he bought largely of hardware dealers, increasing his stock to an abnormal extent, at the same time selling stock in hand at cut prices, at and below cost.

In September, 1899, Gilbert repeatedly attempted to dispose of his stock, both at Martinsville, Va., and Winston, N. C., offering the same at figures considerable below alleged cost.

On or about the 10th day of October, 1899, he sold his Winston stock to respondents, and immediately thereafter left the State. Proceedings in involuntary bankruptcy were at once instituted by his creditors, and he was duly adjudged a bankrupt, and Cox, the complainant, elected trustee of his estate.

The respondents demur to the bill filed in this cause, raising the question of the jurisdiction of the District Court to entertain this cause. It is claimed that as the bankrupt, the trustee and the respondents are all citizens of this State and residents of this district, that by section 23 b of the act cognizance of such a controversy can only be taken by the State Courts.

It is so regretted that the decisions of the Courts upon this question have not been uniform; on the contrary, there are many conflicting opinions. In support of the proposition that the district court has jurisdiction VIDE:

In Re Gutwillig, Fed. Rep. 99 page 337, 34 C. C. A. 577; Davis vs Bohle Fed. Rep. 92 page 325, 34 C. C. A. 372; Carter vs Hobbs Fed. Rep. 92 page 59; In Re Seivers 91 Fed. Rep. 366; In Re Fixen & Co. 96 Fed. Rep. 753; In Re Richards 94 Fed. Rep. 636; In Re Smith 92 Fed. Rep 135; In Re Newberry 97 Fed. Rep. 24; In Re Byrne 97 Fed. Rep. 763; Robinson vs White 97 Fed. Rep. 34 contra; Mitchell vs McClure 91 Fed. Rep. 621; Burnette vs Mercantile Co. 91 Fed. Rep. 365; In Re Kelly 91 Fed. Rep. 504; In Re Rockwood 91 Fed. Rep. 363; In Re Buntrock 92 Fed. Rep. 836; Heath vs Shaffer 92 Fed. Rep. 646; In Re Abraham 93 Fed. Rep. 774.

A careful examination of the cases decided satisfies me that the section referred to, to wit: 23 b providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted" is a limitation upon the jurisdiction of the circuit courts of the United States, and does not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act, and that a court of bankruptcy has jurisdiction of a suit by a trustee to recover property alleged to have

been conveyed or transferred in fraud of creditors, notwithstanding that the trustee and the bankrupt and the defendants are all citizens of the State.

In reaching this conclusion I do not wish to be understood as casting any doubt upon the jurisdiction of the courts of the State to entertain jurisdiction and try suits for any cause of action whatever, brought by the trustee of a bankrupt against parties who fraudulently or otherwise were in possession of the bankrupts estate, or were indebted to the bankrupt.

I am clearly of the opinion that the courts of this State are invested with complete and plenary jurisdiction over fraudulent transfers and conveyances concurrent with this court, and that which ever of the two courts first took cognizance of the case had the right to finally and conclusively dispose of same.

In the case at bar, Cox, trustee for Gilbert, bankrupt chose to institute his bill in equity in this forum, and this court has therefore, acquired jurisdiction.

Vide Ex-Parte Christy, 44 U. S, R. 292; Federal Cases No. 616 Fed. Cases No. 8, 885; Burbank v Bigelow, 92 U. S. R. 179; Woolridge v McKenna, 8 Fed. Rep. 650; Olney v Tanner, 10 Fed. Rep. 101; In Re Anderson, 23 Fed. Rep. 482; Federal Cases No. 709, Fed. Cases No. 8,973; Federal Cases No. 5956; Loveland on Bankruptcy, page 490; Black on Bankruptcy, page 123; Lea Bros. v West, 1st Amer. B. Reg. 264; Affirmed in U. S. Supreme Court, 2 A. B. R; In Eldridge Furniture Co. 1 A. B. R. 112; In Re Bruss-Ritter Co. 1 A. B. R. 58; Carpenter Bros. v O'Connor, 1 A. B. R. 381-384; In Re McKee, 1 A. B. R. 311.

As has been well said by Judge Severns, In re Newberry, 97 Fed. Red. 24: "An anomalous state of things would be presented if the bankruptcy court, which is charged with duty of prompt action in collect-

ing and distributing the estate of the bankrupt should be compelled to await, and be balked by the pendency of proceedings in another court having jurisdiction entirely foreign to its own, and in no manner subject to it."

It is further insisted by respondents that the claimant, as trustee, if he had any right to the stock of goods described, has a plain, clear and adequate remedy at law, and cannot invoke the equitable jurisdiction of this court to enforce his right.

Section 723 Rev. Stat. U. S. provides: "That suits in equity shall not be sustained in either courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

The construction placed on this statute by the Supreme Court of the U. S. is as follows:

"It is not enough that there is a remedy at law, it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy is in equity."

Boyce v Grundy, 3 Pet. 215; Watts v Southerland, 5 Wall. 74.

But the foregoing statute, which is merely declaratory as a rule in common law, is no more binding than the following well established rules governing the proceedings in equity. Equity has always had jurisdiction of subjects like fraud, misrepresentation, concealment and specific performance, and cancellation of instruments which equity has jurisdiction per se and the rule of inadequate legal remedy does not apply.

Amer. & Eng. Enc'y of Law, Vol 2,—201.

Equity always has jurisdiction of fraud, misrepresentation and concealment, and it does not depend upon discovery.

Jones v Bowles, 9 Wall. 364.

Courts of Equity will aid a creditor by removing a fraudulent encumbrance, or a conveyance of his debtor's property.

Hogan v Walker, 55 U. S. R. 29.

In Clement v Nichols, 6 Wall. 299, the same being a creditors bill in the district court to set aside a fraudulent transfer of a stock of goods, it was held, "that equity is the appropriate remedy, being more flexible and capable of administering justice than can be done under the rules of law."

Vide also Rudgens v Knutt, 20 How. 45; Venable v Bank, 2 Pet. 107.

In former bankruptcy acts equitable jurisdiction of the court invoked in the following cases:

Stickey, assignee v Bank 108 U. S. R. 132; Grant, assignee v Bank, 7 Otto. pp. 80; Rogers, assignee v Palmer, 102 U. S. R. 363; Affin v Rasin, assignee, 102 U. S. R. 620; Barlow v Priest. assignes, 103 U. S. R. 293; Duth et al v Wright, assignee, 94 U. S. R. 553; Phipps v Sedgewick, 95 U. S. R. 3; Noblett v McFarland, 92 U. S. R. 101; Goodenow v Milliken, Fed. Cases 5,535; Federal Cases, 6,072: People v Breman, 12 N. B. R. 567.

The jurisdiction is not confined to fraudulent conveyances of real estate, but it extends as well to fraudulent sales of personal property.

Enc'y Pleading & Prac. Vol. 5, pp. 405; Carter v Parker, 10 Me. Appls. pp. 363.

In the matter of alienation of personal property by any means which is in fraud of creditors, courts of equity and courts of law have concurrent jurisdiction.

Smiths Equitable Rem. of Creditors, page 92; Atkins v Dick, 14 Pet. 114.

In a bill filed by a trustee like this the bankrupt is

not a necessary party. The bankrupt is not a necessary party to a suit to avoid a fraudulent transfer.

Buffin v Harvey, 95 U. S. 99; Benton v Allen, 22 Fed. Rep. 448; Harding v Crosely, Fed. Cas. 6,050; Smith's Equit Rem. of Creditors, page 82.

The complainant asks that a receiver be appointed. Mr. Smith in his most excellent work on Smith's Equitable Remedies of Creditors, page 315 says: "It is common practice in equitable proceedings, either in creditors bills or bills in the nature of creditors' bills and supplemental proceedings, to appoint a receiver when the property is of such a nature as to render it necessary, or to facilitate the action of the court. The appointment is peculiarly appropriate if the transfer consists of personal property, where the possession is an important factor of ownership, and where concealment or removal is so easily accomplished."

The Supreme Court of North Carolina in Ellett v Newman, 92 N. C. 523, in a case involving personal property very similar to the case at bar, uses the following language: "The authority of the court to preserve property the subject of litigation, pending the action, until final judgment, and then apply it as justice may require, is too manifest to admit of question and such authority should be exercised when it appears that there is reasonable grounds to believe that the plaintiff may cover, and the interference of the court is necessary to protect the property in question pending the controversy."

Vide Parker v Grammar, Phil. Eq. pages 28, 32; Graycroff v Morehead, 67 N. C. 422; Morris v Willard, 84 N. C. 293; Levenson v Elson, 88 N. C. 182; Twitty v Logan, 80 N. C. 89; Cone v Combs, 18 Fed. Rep. 576; Sheppard v Pepper, 133 U. S. 626.

In the case at bar it appears that this is a stock of

merchandise subject to deterioration and fluctuation in prices. That no inventory of the property has been taken, and until this is done no correct estimate and value can be placed thereon. That the respondents owe eight thousand dollars to the Wachovia National Bank of Winston, and that their property is listed at little more than $9,000, nearly all of wnich is personal property. In view of these facts, in the judgment of the court, it is proper that a receiver should be appointed until the equities of all parties interested should be determined by a final decree.

Upon the rendering of the foregoing opinion, the appellant Wall & Huske, filed a petition for review in the circuit court of appeals for the Fourth Circuit and the cause was there heard in February, 1900, before GOFF and SIMONTON, Circuit Judges and WADDILL, District Judge and the opinion of the court was delivered by His Honor WADDILL, District Judge on May 1st, 1900, which for the convenience of the court is here printed in full and will be found duly reported in the Federal Reporter, Vol. 101, at page 403:

"This case is now before the court on an application to "superintend and revise in matter of law" a certain decree of the United States District Court for the Western District of North Carolina, and the real question presented is whether said court has jurisdiction in equity to entertain a bill to set aside and annul a bill of sale for a stock of goods made by the bankrupt, W. H. Gilbert to the petitioners here, three days before the petition of involuntary bankruptcy was filed against him by his creditors, and on account of which bill of sale he was adjudged a bankrupt."

The trustee for the bankrupt attacked said transfer

because fraudulent, and made to hinder, delay and defraud the bankrupt's creditors, and averred that the petitioners here entered into collusion with the bankrupt to defraud his creditors, and insisted that the goods were still the property of the bankrupt, and the title in him as trustee. Said petitioners, on the other hand, claim to be purchasers in good faith, and for a present fair consideration, and raise especially the question of jurisdiction aforesaid.

The question of the jurisdiction of the United States District Court over controversies between third parties, or adverse claimants to the bankrupt, and the bankrupt's trustee, is one that gave rise to much controversy under the former bankrupt laws, and the present act has afforded fresh opportunity for a revival and renewal of many of the objections urged against previous legislation on the subject of the Federal court's jurisdiction. Indeed, under the present act, the claim of limitation on the jurisdiction of the United States District Court goes to the extent of excluding that tribunal from all jurisdiction in cases of the class now under consideration; the contention being in effect, that the jurisdiction conferred upon that court under the existing act is administrative merely in its character, and is limited to entertaining petitions of bankrupts, making adjudications in such cases. distributing the estates brought in, and granting discharges; and that as to all matters affecting the bankrupt's estate, the bringing in and collection of assets, the determination of the rights of the parties of the character involved in this cause, that resource can alone be had to the state courts, unless it happens that by the amount involved, and the citizenship of the parties jurisdiction would be in the United States Circuit Court. And the contention as to where the bankrupt's trustee can sue goes even further, name-

ly, that he is confined entirely to the state court, unless suit be allowed in the United States Circuit Court with the defendant's consent.

The far reaching effect of these conflicting claims will readily be appreciated; one makes the state courts practically the medium through which the law is to be administered, the other the federal courts. If the district courts have only the jurisdiction conceded to them, then they become so far as the bankrupt's estate is concerned unimportant tribunals, their chief office as to the bankrupt's estate being to distribute ratably among creditors such estate as the bankrupt sees proper to bring in, or such as other courts may from time to time, and indefinitely, decide should be distributed.

In the consideration of so important a question, in the administration of a national bankrupt law, it is fortunate that we are aided by the interpretation given by the highest courts in the land to previous acts, having under review the same positions taken here, and while, of course, these decisions are not controlling in the interpretation of the present act, they shed much light on the question, and to them, as well as to the fact that the subject under consideration is that of a national bankruptcy act, suppose to be uniform in its character great consideration should be given.

In the case of Lathrop v Drake, 91 U. S. 516, Mr. Justice BRADLEY, in discussing the jurisdiction of the District Court under the act of 1867 said:

"Of this there are two distinct classes: First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or the refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in

reference to alleged property of the bankrupt or to claims alleged to be due from or to him. The language conferring this jurisdiction in their respective districts, in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the general classes before mentioned."

If the two distinct classes of jurisdiction thus mentioned by Mr. Justice BRADLEY are kept in view, it will aid materially in the interpretation of the present act for precisely the same classes of jurisdiction in terms are enumerated in the present act—indeed the act of 1898 goes further than either the act of 1841 or 1867, in describing the second class, and specifically provides that the District Courts shall be invested with such jurisdiction "at law and in Equity as will enable them to exercise original jurisdiction in bankruptcy proceedings."

Just why jurisdiction "at law and in equity" should have been bestowed, if only the purpose was to create the mere administrative tribunal claimed, cannot well be conceived. The act in this regard is more comprehensive than the previous acts, those of 1841 and 1867 not containing the words "at law and in equity" in terms.

The grant of jurisdiction to the District Court under the act of 1898 is found in section 2 of the act, and is in these words:

"Are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits as now established or as they may hereafter be changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their

respective terms, as they are now or may be hereafter held."

And then follows the jurisdiction at law and in equity mentioned and defined specifically in the sub-divisions, to wit:

To (1) "Adjudge persons bankrupt who have had their principal place of business, etc.

(2) "Allow and disallow claims," etc.

(3) Appoint receivers or marshals, upon application of parties in interest, in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition, and until it is dismissed or the trustees qualified."

(5) "Authorize the business of bankrupts to be conducted for limited periods by receivers," etc.

(6) "Bring in and substitute any additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of the matter in controversy."

(7) "Cause estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

(15) "Make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

Then continuing the specific enumerations (nineteen in all) those specially quoted above relating particularly to the jurisdiction as a court of law and equity and the others to the jurisdiction as a court of bankruptcy, over bankruptcy proceedings, concludes:

"Nothing in this section shall be construed to deprive

a court of bankrup'cy of any power it would possess were certain specific powers not herein enumerated."

This proviso and conclusion of the section shows plainly that it was not the purpose of Congress in enumerating the nineteen specific grounds of jurisdiction to limit or take away the jurisdiction conferred by the general grant of power. The language "such jurisdiction at law and equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms as they are now or may hereafter be held," would clearly confer upon United States District Courts jurisdiction to hear and determine cases of the character now under consideration. To clothe the court with power to entertain a petition in bankruptcy, and discharge and relieve the bankrupt from the payment of his debts, and not to confer upon it the power to make the power thus receiving an acquittance and release, and those fraudulently colluding with him, bring in and give up to the creditors interested the bankrupt's property which of right belongs to them, would be a strange anomaly, and unless there is something in the jurisdiction of the law of bankruptcy, and the jurisdiction conferred on courts of bankruptcy, so peculiarly engaged in the administration of insolvent estates, and the detection and prevention of fraud, and singularly combining in their legal nature and operations the elements and powers of courts of admiralty and courts of equity, it ought not to be accepted and adopted. To say that the United States District Court, sitting as a court of bankruptcy, with all the analogous powers and jurisdiction of a court of equity, and with jurisdiction at law and in equity specially conferred upon it as ancillary and supplementary to its inherent power, in an involun-

tary bankruptcy proceeding, can only afford the creditors the relief of making certain that the debtor is a bankrupt, and has committed acts of bankruptcy, and where he has fraudulently transferred his estate, although it be the act of bankruptcy set up, as in this case, that as against the alleged fraudulent transferree no relief can be afforded, but the creditors must inaugurate in the State courts, wherever such transferree may reside, litigation to secure any substantial relief would be to impose upon them a burden that would be unreasonable in the extreme, and in many cases one that would be entirely ineffective; and besides, it would bring about a result manifestly not contemplated by those enacting the law, the predominating feature of all bankruptcy legislation being simplicity and expedition in the collection and administration of bankrupts' estates. Bankrupts wishing to defraud their creditors, and those colluding with them, would be a bungling set of conspirators who could not elude and evade a law so handicapped by the machinery necessary to put it in motion, and the result would be that the estate, pending the many stages of litigation through which creditors would have to pass, and, indeed in anticipation of the necessity of the various requirements, would be readily placed beyond their reach.

The claim of limitation upon the District Court's jurisdiction is based upon the concluding words, "except as herein otherwise provided," in sub-division 7, section 2. The subdivision reads:

(7) "Cause estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Those making this contention apparently overlook the concluding paragraph of section 2 of the act, which

provides that the particular specifications named shall not be construed to deprive the court of bankruptcy of any jurisdiction conferred by the general grant of power. The bankrupt act of 1841 was less comprehensive as to the District Court's jurisdiction than is the present act, for no specific power to collect debts was given, nor were the courts granted in terms common law and equity jurisdiction."

Section 6 of the act is as follows:

"The District Court in every district shall have jurisdiction in all matters and proceedings in a bankruptcy arising under this act. And the jurisdiction hereby conferred on the District Court shall extend to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the closing of the proceedings in bankruptcy."

The act, however, was held to confer jurisdiction upon the court, the same being declared to be incidental to the powers given. Mitchell v Manufacturing Co., Fed. Cas. No. 9,662, Ex parte Christy, 3 How. 312. Under the bankrupt act of 1867, the provisions as to the Court's jurisdiction was as follows:

"The Several District Courts of the United States are hereby constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. And the jurisdiction hereby conferred shall extend———————— to the collection of all the assets of bankrupt."

Under this clause the court held that the jurisdiction at law and in equity was granted, being necessarily implied from the powers expressly given. Lathrop v Drake, 91 U. S 516, supra; Goodall v Tuttle, Fed. Cas. No. 5,533; Sherman v Bingham, Fed. Cas. No. 12,762.

Those disputing the District Court's jurisdiction insist that the qualifying words "except as herein otherwise provided" of subdivision 7, section 2, refer to section 23, subdivisions "a" and "b" and that the effect of the qualification is to take from the Federal District Court jurisdiction in all cases of the character now under consideration; or where the rights of third persons in possession of and adverse claimants to the bankrupt or his trustee are concerned.

We need not specifically consider subdivision "a," section 23, as it does not immediately concern the question presented in this case. In passing, it may be said that abundant scope can be given that section, without in the slightest infringing on the general chart of jurisdiction laid out for the United States District Court, and in entire harmony with that court's jurisdiction.

1st. One of the purposes of said subdivision was to make clear that the full and sweeping jurisdiction given the District Court in bankruptcy matters, should not operate to take away from the Circuit Court its proper jurisdiction in cases arising out of the bankruptcy proceedings, where the amount and citizenship of the parties entitle them to go into a Federal Circuit Court.

2nd. Another to prescribe that the trustee of a bankrupt's estate should not, merely because of his being an officer of a Federal Court, have the right to go into the Circuit Court, regardless of the amount involved, or of the citizenship of the parties.

Subdivision 23 "b" is as follows:

"(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted; unless by consent of the proposed defendant."

The construction placed upon this clause has not been harmonious; indeed, quite a contrariety of views have been judicially expressed as to its true intent and meaning. Some insist that it refers not to the jurisdiction of the court at all, but to the venue of suits and required suits to be instituted in the district and subdivision in which they could have been brought if prosecuted by the bankrupt; others, that it is meant as limitation on the jurisdiction of the Circuit and not the District Court; others, that it confers jurisdiction to the State court, except with the consent of the defendant, and others, who earnestly insist that it places all jurisdictions in the State courts. Which of either of these conflicting constructions may be correct, we need not stop to determine, as in our view the clause in question clearly does not, assuming the exception in subdivision 7, Sec. 2, specially to refer to it, take away from the United States District Court jurisdiction to entertain suits of the character now under consideration, or causes affecting the bankrupt's estate, merely because the rights of third persons, or parties claiming or having an interest adverse to the bankrupt or his trustee, may be involved. Those making the claim are forced to deny the jurisdiction of the United States District Court altogether: their theory is inconsistent with concurrent jurisdiction in the two courts, and if they are right, the result inevitable follows that the State courts have exclusive jurisdiction of this class of suits, and as to suits by the bankrupt's trustee, it even denies him the right of admission to the United States Circuit, as well as the District Court, although by paragraph "e" section 70, he is specially authorized to avoid any transfer of the bankrupt's estate that a creditor of the bankrupt might have avoided, or to recover any property, or the value, so

transferred, from the person to whom it was transferred, and such creditor could have proceeded in the United States Circuit Court in a proper case for its jurisdiction.

The exception contained in subdivision 7, sect. 2 was manifestly not intended to have the effect claimed for it, and it cannot be given that interpretation without violating well understood canons of construction. That exceptions should be strictly construed is elementary, and if an interpretation of an act will give effect to its several provisions, as against one that will only partially accomplish this purpose, can be arrived at, it should always be adopted. An exception should not be construed as to wholly destroy the grant of which it forms a part. United States v Dickson, 15 Pet. 141, 165; Dallas Sav. Bank v U. S. 19 Wall. 227; Ryan v Carter, 93 U. S. 78.

The view presented that section 23b has reference to the VENUE, rather than to the jurisdiction of the court, has considerable force in it, as it should not be presumed that Congress meant to legislate upon the theory that the consent of the defendant could give jurisdiction to a court, and consent is entirely consistent with the idea of venue. It is allowable for a defendant to appear and submit to the jurisdiction of a court otherwise possessed of jurisdiction, and in which he could not be sued without his voluntary appearance. But his consent would avail nothing if the court was not clothed with jurisdiction of suits of the character involved; and full scope can be given to the section by its application to cases of the class that the bankrupt might have brought; i. e. to the collection of debts due the bankrupt. To require such suits to be brought at the debtor's home in the state court, is perhaps what Congress intended, unless with consent of the defendant suit should be instituted

in the United States District Court, a tribunal also having jurisdiction of the parties, and over the whole subject matter.

To allow this section to qualify the whole bankrupt act, and at the same time make it applicable as well to suits that the trustee brings, as the representative of the creditors, as to those of the character that the bankrupt himself could not have brought, would be to clearly violate the plain letter and manifest spirit of the act. Another view shows conclusively that it was not intended to take away from the bankrupt court jurisdiction of the class of cases now under consideration, namely, which involves dealings with the bankrupt's estate in contravention of the rights of his creditors, the bankrupt could not have brought such suits. This is a suit by the trustee in bankruptcy to set aside and annul an alleged fraudulent bill of sale, and transfer of property made by the bankrupt on the eve of his going into bankruptcy, and to have the property of the bankrupt surrendered to the trustee, cleared of such cloud on his title. The trustee is vested as of date of adjudication, by operation of law, with the title of the bankrupt, among other things, "to all property transferred by him in fraud, of his creditors, as well as to all property, which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold by judicial process against him." Bankruptcy Act. Section 70.

The word "transfer" includes the sale and every other mode of disposition of or parting with property, absolutely or conditionally, as by payment, pledge, mortgage, security or gift. Bankruptcy Act, Sec. 1, clause 55.

The title to the property alleged to have been fraudulently conveyed, by the express terms of the act, as of

date of adjudication, vests in the bankrupt's trustee, upon the assumption of the transfer being void, and the bankrupt court has, as authorized by the act, appointed a receiver to seize and take charge of the property involved, and now, in fact holds the same. Can it be seriously claimed that in such a case with an officer of the court before it with property thus vested in him, and the same seized by the court, and brought in for the benefit of creditors, that the court is powerless to afford relief either to its own officer or to the creditors of the bankrupt, because the rights of an alleged fraudulent transferree is involved, and that on that account the hands of the bankrupt court should be stayed until the question of the transferree's rights can be determined in a state court? This cannot be the law. The property is in custodia legis, and all persons having interest in it, or claiming title to it, have necessarily to come into court having it in charge. Any other course would be unheard of: it would be to except the United States District Court from the otherwise universal and fundamental rules, principles and practices of courts of justice in respect to property lawfully under their charge.

Another view of the act would seem to be equally conclusive of the question under consideration. The whole act should be taken into account, and not a single or isolated section.

"It is an established rule in the exposition of statutes, that the intention of the law giver is to be deduced from a view of the whole and every part of a statute, taken and compared together————————And the reason and intention of the law giver will control the strict letter of the law, when the latter would lead to a palpable injustice, contradiction and absurdity." I Kent. marginal page 462.

"The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes, relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Upon the same principle, whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied. 1 Kent. marginal page 464.

When the fact is taken into account that the question presented is whether Congress meant in dealing with a subject confined by the Constitution to the Federal government, and effecting the people of the entire country, and especially charged to be uniform in character, meant to leave the important features of jurisdiction, under the enactment, to the conclusive control of the courts of forty-four different States, or to the Federal courts, where one general and harmonious rule of interpretation should be adopted and followed, there ought to be but little difficulty in reaching a corect conclusion. The State courts, as to many matters in which conclusive jurisdiction is not conferred on the Federal courts, have a concurrent jurisdiction with the courts of bankruptcy, but such jurisdiction is not conferred by act of Congress—it exists in those courts by reason of their general jurisdiction, and independent of any enactment of Congress. Indeed, Congress is without power to give jurisdiction to the State courts to administer the bankrupt law, so far as the collection of the estates of the bankrupt is concerned; and while such State courts in enforcing the rights and duties under the Federal law exercise the concurrent jurisdiction with Federal courts, it is entirely a discretionary jurisdiction on their part, and one they may wholly renounce or conditionally exercise whenever they wish to do so. Sherman v

Bingham, Fed. Cas. No. 12,762; Goodall v Tuttle, Fed. Cas. 5,533; Martin v Hunter's lessee, 1 Wheat. 304.330: 4 L. Ed. 97; Robertson v Baldwin, 165 U. S. 275,17 Sup. Ct. 326, 41 L. Ed, 715.

Every consideration accentuates the desirability if not the necessity, of the Federal courts having at least a concurrent jurisdiction in the administration of a national Bankruptcy act. It cannot be presumed that Congress was not fully alive to the importance of this question, particularly as it was one upon which so much stress was laid under the former acts. In discussing this question, in Ex-Parte Christy, 3 How. 292, 320, 321, supra, Mr. Justice STORY said:

"If we are told that resort may be had to the State courts for redress, one answer is, that in some of the States no adequate jurisdiction exists in the State courts. But a stronger and more conclusive answer is, that Congress did not intend to trust the working of the bankrupt system solely to the State courts of twenty-six States, which were independent of any control by the general government, and were under no obligation to carry the system into effect. The judicial power of the United States is, by the Constitution, competent for all such purposes, and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do. The truth is that in no way could the bankrupt system be put in operation, without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof."

And in Lathrop v Drake, 91 U. S. 516, 518, supra, Mr. Justice BRADLEY said:

"The State courts may undoubtedly be resorted to in case of ordinary suits for the possession of property or

the collection of debts; and it is not to be presumed that embarrassments would be encountered in these courts in the way of a fair and prompt administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence of those of the States in which it is possible that embarrassment might arise."

The precise question here presented under the Act of 1898, as far as we have been able to ascertain, has never been passed upon by the Circuit Court of Appeals of any of the circuits, though on kindred questions, and in some instances, one almost conclusive of the present controversy, several of these courts have passed, namely; In the Second circuit in Re Gutwillig, 34 C. C. A. 377, 92 Fed. 337; In the Eighth circuit, in Davis v Bohle, 34 C. C. A. 37, 92 Fed. 325; in the sixth circuit, in Carriage Co. v Stengel, 37 C. C. A. 210, 95 Fed. 637; in the ninth circuit, in Re Francis-Valentine Co. 36 C. C. A. 499, 94 Fed. 793; in the fifth circuit, in Re Abraham, 35 C. C. A. 592, 93 Fed. 767; and in this circuit in Bear & Co. v Chase trustee, 99 Fed. 920.

The decisions in all of the circuits, with the exception of the Fifth, have been favorable to the views herein expressed, while those of that court tend rather to support the contrary view. The decisions of the District Courts have likewise been favorable to the views herein expressed. Only the cases in those courts beariug particularly on the point in issue here and in conformity herewith will be given. In re Seivers, 91 Fed. 366; Carter v Hobbs, 92 Fed. 39; In re Smith, 92 Fed. 135; Robinson v White, 97 Fed. 24; In re Newberry, 97 Fed. 24; Murray v Beal, 97 Fed. 567;

In re Woodbury, 98 Fed. 833; In re Hammond, 98 Fed. 845; Pepperdine v Headley et al, 98 Fed. 863.

The following text writers in their treatises upon the present act, will be found to support the jurisdiction of the District Court herein laid down. Loveland on Bankruptcy, pages 67-73, 409; Black on Bankruptcy, pages 123-4; Lowell on Bankruptcy, pages 411-12; Collier on Bankruptcy, pages 14-19; Smith's Equitable Rem. of Creditors, Secs. 407, 418.

The petitioners earnestly insist that if the United States District Court has jurisdiction to entertain a suit of the character under consideration, that the action should be by appropriate proceedings at law, and not by bill in equity.

That courts of equity are clothed with full power and authority to entertain suits involving questions of fraud in conveyance and transfer of property, and the annulling and cancellation of such transfers, is too well and firmly established in the jurisprudence of the country to admit of serious question at this late day.

It is not enough that there is a remedy at law, it must be plainly adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity. (Boyce v Grundy, 3 Pet. 213).

In Clements v Moore, 6 Wall. 299, the same being a creditors bill in the District Court to set aside a fraudulent transfer of a stock of goods, the court said that Equity was the appropriate remedy, being more flexible and tolerant, and capable of administering justice to fit the particular case, than could be done under the rules of law.

"It is object that a court of equity has no jurisdiction of the case because the law affords a complete remedy

in damages, This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation and concealment; and it does not depend on discovery." (Jones v Bowles, 9 Wall. 364, 369).

"Jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

(Mr. Chief Justice FULLER, in Kilbourne v Sunderland, 130 U. S. 505, 515).

For the reasons giving the decision of the lower court is affirmed at the costs of the petitioners.

Supreme Court of the United States.

No. 504.—October Term, 1900.

John D. Wall and Thomas W. Huske, trading as Wall & Huske, Appellants, *vs.* Walter O. Cox, Trustee of W. H. Gilbert. | On a certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[April 29, 1901.]

Mr. Justice Gray delivered the opinion of the Court.

On October 12, 1899, certain creditors of W. H. Gilbert filed against him a petition in bankruptcy in the District Court of the United States for the Western District of North Carolina, alleging that he was insolvent, and on October 10, 1899, transferred his stock of goods, with intent to hinder, delay and defraud his creditors, by a bill of sale to John D. Wall and Thomas W. Huske.

On October 14, 1899, the District Court issued an order of notice to Wall and Huske to show cause on October 24, 1899, why they should not be perpetually enjoined from disposing of the goods alleged to have been purchased by them from Gilbert, and meanwhile restraining them from disposing of it. At the time of the issue of that order, Wall and Huske had those goods in their possession.

The District Court, on October 27, 1899, adjudged Gilbert a bankrupt; and on November 6, 1899, "ordered that the restraining order heretofore issued be continued until the appointment and qualification of trustee of W. H. Gilbert, bankrupt. Upon the appointment and qualification of said trustee, in a proper case and upon a proper showing, an injunction or restraining order may be obtained upon application, in which Wall and Huske, defendants above named, may be made parties, restraining the sale or other disposition of any of the property until a hearing may be had and the matters at issue be determined, either by a suit in equity or action at law in the United States courts or the courts of the State, as petitioners may be advised."

Walter D. Cox, on November 23, 1899, was duly elected and qualified as trustee of Gilbert, bankrupt; and on December 6, 1899, filed a plenary bill in equity in the District Court of the United States for the Western District of North Carolina against Wall and Huske, to set aside as fraudulent the sale by Gilbert to them, alleging that Cox had requested them to deliver the property to him as trustee to be divided among Gilbert's cred-

itors, but they had refused to do so and alleged that the sale to them was valid, and they thereby acquired title to the property, and were purchasers in good faith and for a present fair consideration. The bill prayed that the sale be set aside, and the property be decreed to belong to Cox as part of the bankrupt's estate, and for an injunction and a receiver.

On December 16, 1899, Cox filed a supplemental bill, setting forth the former bill, and its service upon Wall and Huske, alleging that the property was within the District and in the jurisdiction of this court, and was deteriorating in value by reason of being stored.

At the time of the filing of these bills, and of the service of the subpœna upon Wall and Huske, they were in possession of the stock of goods, holding it under the bill of sale from Gilbert.

On the filing of the bill, the District Judge issued an order to Wall and Huske to show cause why a receiver should not be appointed to take charge of the stock of goods, and issued an injunction restraining them from disposing of it until the further order of the court. By consent, the hearing was postponed until January 9, 1900.

On January 6, 1900, Wall and Huske, "specially appearing under protest for the purpose of this plea, and for no other," filed a plea and demurrer, assigning as reasons, that the plaintiff had an adequate remedy at law; that the District Court had no jurisdiction to entertain this bill, or to determine the question arising between the plaintiff, as trustee in bankruptcy of Gilbert, and these defendants; that the defendants claimed title to the property described in the bill under a purchase from Gilbert prior to the institution of proceedings in bankruptcy against him; that both the plaintiff and the defendants were citizens of the State of North Carolina; and that the defendants do not consent to the jurisdiction of the court.

On January 9, 1900, a hearing was had on the motion for a receiver and an injunction, and the demurrer and plea, without objection to its form; and on January 15, 1900, the District Court overruled the demurrer and plea to the jurisdiction of the court, ordered the injunction to be continued until the final hearing of the cause, and appointed a temporary receiver to take into his possession the stock of goods. 99 Fed. Rep. 546.

On January 22, 1900, Wall and Huske filed in the Circuit Court of Appeals a petition asking the supervisory power of that court under the Bankrupt Act of 1898. Upon that petition the decision of the District Court was affirmed on May 1, 1900. 101 Fed. Rep. 403.

On June 2, 1900, Wall and Huske filed a motion for a rehearing, which was granted by the Circuit Court of Appeals; and that court certified the following questions on which it desired the instructions of this court:

"First. Under the facts and the pleadings above stated, had the District Court of the United States for the Western District of North Carolina jurisdiction over the controversy?

"Second. Said District Court having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings, or in ancillary proceedings instituted either by the original petitioners, the receiver of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property thus in the court's possession, and do full and complete justice in one litigation?"

In disposing of the questions certified, we are confined to the facts stated in the certificate, and cannot consider the allegations, made in the briefs, of other facts.

According to the statements of the certificate, the present case is a bill in equity, filed by a trustee in bankruptcy in the District Court of the United States in which bankruptcy proceedings are pending, against persons to whom the bankrupt, before the petition in bankruptcy, had made a sale and conveyance of property, which the plaintiff sought to set aside as fraudulent against creditors, but which the defendants asserted to have been made in good faith and to have vested title in them. This is a bill, of which, unless by consent of the defendants, the District Court of the United States, as was directly adjudged by this court at the last term, since the first hearing of this case in the Circuit Court of Appeals, has no jurisdiction under the Bankrupt Act of 1898. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Mitchell* v. *McClure*, 178 U. S. 539; *Hicks* v. *Knost*, 178 U. S. 541. The statement certified distinctly shows that the defendants, specially appearing for the purpose, protested that the District Court had no jurisdiction to entertain this bill, or to determine the question arising between the trustee and the defendants, and that the defendants did not consent to the jurisdiction of the court. The answer to the first question certified must therefore be that the District Court had no jurisdiction of the case.

The second question, if it does not depend on the first, is too comprehensive and indefinite to be answered at all. It speaks generally of the District Court having appointed a receiver; but does not state, nor does the certificate show, that the receiver was appointed before the election of the trustee in bankruptcy. Beyond this, the question comprehends what the District Court may do, not merely on this bill by the trustee, but on proceedings, original or ancillary, by the petitioning creditors, or by the receiver, or on the court's own motion.

First question answered in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.